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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

OAKLAND RAIDERS, LTD., and LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 1984

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QUESTION PRESENTED

Whether adherence by the members of a professional sports league to the league agreement designating the locations in which each member will conduct league operations constitutes a conspiracy among business competitors condemned by Section 1 of the Sherman Act.[1]

[1] Petitioners do not make, and this question does not raise, any contention that all actions by a league and its members are beyond attack under Section 1 of the Sherman Act.

THE PARTIES

Petitioners-defendants are the National Football League (NFL), a professional sports league organized as an unincorporated association, and twenty-seven of its twenty-eight member clubs.[2] Intervenor-defendant Oakland Coliseum will separately petition for review. Respondents-plaintiffs are the Los Angeles Memorial Coliseum Commission (Coliseum) and the Oakland Raiders, Ltd. (Raiders), the twenty-eighth NFL member club, now operating as the Los Angeles Raiders.

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[2] Baltimore Football Club, Inc. (Indianapolis Colts); Buffalo Bills, Inc.; Chargers Football Company (San Diego Chargers); Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; Dallas Cowboys Football Club, Inc.; Detroit Lions, Inc.; The Five Smiths, Inc. (Atlanta Falcons); Green Bay Packers, Inc.; Houston Oilers, Inc.; Kansas City Chiefs Football Club, Inc.; Los Angeles Rams Football Company; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; New England Patriots Football Club, Inc.; New Orleans Saints Louisiana Partnership; The New York Football Giants, Inc.; New York Jets Football Club, Inc.; Philadelphia Eagles Football Club, Inc.; Pittsburgh Steelers Sports, Inc.; Pro-Football, Inc. (Washington Redskins); Rocky Mountain Empire Sports, Inc. (Denver Broncos); San Francisco Forty-Niners; Seattle Professional Football; St. Louis Football Cardinals Company; and Tampa Bay Area NFL Football, Inc.

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OAKLAND RAIDERS, LTD., and LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in its cases Nos. 82-5572 to 82-5574, entitled *Los Angeles Memorial Coliseum Commission* v. *National Football League, et al.*

OPINIONS BELOW

The opinion of the Court of Appeals' majority and the related dissenting opinion are reported at 726 F.2d 1381 (9th Cir. 1984) and are at Appendix A, pp. 1a-51a. That court's order denying a petition for rehearing and rejecting a suggestion for rehearing en banc is at Appendix F, pp. 95a-96a. The opinion of the District Court holding that the NFL location agreement is, as a matter of law, a conspiracy among independent business competitors within Section 1 of the Sherman Act is reported at 519 F. Supp. 581 (C.D. Cal. 1981) and is at Appendix B, pp. 53a-59a. The order of that court enjoining

enforcement of the league location agreement is at Appendix E, pp. 93a-94a.

JURISDICTION

The final judgment of the Court of Appeals was entered on February 28, 1984, and petitioners' timely petition for rehearing was denied on June 19, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), and an Act of Congress in 1966 exempting the consolidation of the NFL and another professional football league (the American Football League (AFL)) from the antitrust laws, P.L. 89-800, 15 U.S.C. § 1291 (1982), are set forth in Appendix G, p. 97a.

STATEMENT OF THE CASE

The NFL produces professional sports league entertainment consisting of a series of integrally related athletic contests. Each member club annually presents 16 regular season football games, which are followed by post-season playoffs and eventually the Super Bowl. Each member club is organized under separate ownership, thus assuring public confidence in the integrity of each team's efforts on the playing field.

The respondent Coliseum operates a stadium in Los Angeles suitable for the presentation of sports and other entertainment events. Commencing in 1970, the respondent Raiders conducted NFL operations in Oakland, California, pursuant to league agreement. For the prior ten years it had conducted AFL operations in Oakland, under a similar league agreement.[1]

[1] From 1960 to 1966, the two leagues operated as separate, competing leagues. In 1966, they agreed in principle to a plan for consolidating their operations into an expanded single league, with each of the then-existing AFL member clubs, including the Oakland Raiders, to become NFL members. Congress approved that plan in the same year. P.L. 89-800 (1966), 15 U.S.C. § 1291 (1982). The expanded league commenced operations in 1970.

All of the NFL members "subscribe to and agree to be bound by the Constitution, By-Laws, Rules and Regulations of the League and any amendments or modifications thereof." NFL Const. and By-Laws, Section 3.3(A)(6) (PX 38; 13 Tr.2d 2311-12). This interdependent network of commitments governs the production and presentation of NFL football—a product that must necessarily be produced by all the members acting in concert. Through the NFL, the members establish divisions, conferences, and scheduling patterns that foster public interest in their product; negotiate national television contracts, the proceeds of which are divided equally among the members; agree upon the division of gate receipts between home and visiting teams; share the costs of centralized league management activities; and jointly direct all other phases of the League's operations. As the court below noted, over 90 percent of the members' total revenues are shared in accord with their agreement. (12a.)

Each NFL member "holds a franchise from the League to operate a professional football club in a designated city." Section 3.4. The receipt of a League franchise constitutes a commitment to the other members to operate in a designated home location, which is defined as "the city in which such club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city . . . ." Section 4.1.

In this case, respondents challenge the legality of Section 4.3 of the NFL Constitution and By-Laws, which provides in pertinent part:

> "No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the League." [2]

Respondents contend that this limitation on an individual member's ability to determine unilaterally the location in which

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[2] The three-fourths voting standard of Section 4.3 is the norm for the conduct of virtually all League decisionmaking.

it will conduct League operations violates Section 1 of the Sherman Act.

In 1978, the Coliseum commenced this action against the NFL and all 28 of its members, including the Oakland Raiders, claiming that Section 4.3 illegally prevented it from obtaining an NFL tenant. From 1978 until 1980, the Raiders, represented by League counsel, joined in the League's defense of Section 4.3. In early 1980, the Raiders, without seeking approval under Section 4.3, announced their intention to abandon Oakland—where they operated in the Bay Area along with the League's San Francisco 49ers—and unilaterally to relocate to Los Angeles, where they would operate along with the League's Los Angeles Rams, who play their home games in nearby Anaheim.

The NFL member clubs investigated the circumstances of the Raiders' proposed unilateral relocation, and at a meeting in March, 1980, voted without dissent that the Raiders should continue to conduct League operations in Oakland. The Raiders thereafter played the 1980 and 1981 NFL seasons in Oakland.

After deciding to abandon Oakland, the Raiders became a co-plaintiff in this action, joining the Coliseum in seeking both an injunction barring enforcement of Section 4.3 and damages for the additional profits each plaintiff allegedly would have made if the Raiders had transferred to Los Angeles immediately following their decision to relocate. The District Court directed bifurcation of the issues of liability and damages, if any. At the first trial, on cross-motions for directed verdict, the District Court ruled that, as a matter of law, each league member should be treated as an independent economic competitor of each other member in considering whether the league location agreement violates Section 1 of the Sherman Act. (53a-59a.) This first trial ended with a hung jury.

At the second liability trial, the jury was again instructed to consider the league location agreement as an agreement among independent economic competitors. The jury found that such agreement constituted an agreement in restraint of trade that violated Section 1, and the trial court enjoined enforcement of Section 4.3 of the League's Constitution. (92a-94a.)

After entry of the injunction, the Raiders played the 1982 and 1983 NFL seasons in Los Angeles. In doing so, they continued as an NFL member, joined with the other members in conducting NFL operations in Los Angeles and elsewhere, and retained all benefits of League membership, including full participation in the League's television and other joint revenue-producing activities.

On appeal, even the majority of the Ninth Circuit panel acknowledged that "the NFL teams are not true competitors, nor can they be" and that "the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture and to secure each venturer the legitimate fruits of that participation." (15a, 23a.) Nonetheless, in a split decision, the court affirmed the holding of the District Court that, as a matter of law, the league location agreement constituted a conspiracy among economic competitors subject to Section 1 of the Sherman Act. The majority found no error in the trial court's rule of reason instructions or in its denial of motions seeking trial of the action outside Los Angeles in a neutral district.[3]

Judge Spencer Williams, sitting by designation, dissented. His opinion concluded, based on its comprehensive analysis of the NFL's operations, that the NFL members' agreement on the location of franchises constitutes, as a matter of law, action by a single enterprise that does not restrain competition among economic competitors. (34a-51a.) Judge Williams distinguished intra-league agreements, such as that relating to team location, from extra-league agreements reaching beyond the production of NFL football that, in his view, would be subject to Section 1 of the Sherman Act.

The damage trial resulted in judgments for the Coliseum of $14.58 million and for the Raiders of $34.65 million, both after

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[3] The trial judge (Judge Pregerson) was appointed to the Court of Appeals before the first trial. While on that court, he presided at both trials on the merits and also at the subsequent damages trial. The Court of Appeals' panel was thus called upon to review a series of rulings and actions by a member of that court.

trebling. Petitioners' appeal from these judgments has been briefed but not yet argued to the Court of Appeals.[4]

REASONS FOR GRANTING THE WRIT

The courts below struggled with an important question that has perplexed the lower courts and resulted in confused and conflicting decisions—the manner of applying Section 1 of the Sherman Act to joint actions by members of professional sports leagues. Such leagues are a unique form of business organization with broad and increasing commercial, cultural, and public interest significance. This question, which affects numerous cases pending in the federal courts, has not been, but should be, settled by this Court.

In deciding this question, the Court of Appeals' majority failed to accord significance to the economic realities and single enterprise characteristics of sports leagues and acted contrary to the principles underlying Section 1 of the Sherman Act as most recently applied by this Court in *Copperweld Corp.* v. *Independence Tube Corp.*, 104 S. Ct. 2731 (1984). Its decision further conflicts with earlier decisions of this Court concerning the ambit of Section 1 with respect to internal arrangements within such enterprises. The decision thus renders illegal constructive business arrangements that enhance consumer welfare and do not restrain business competition, and rewards those who choose to violate such arrangements.

I. The Application Of Section 1 Of The Sherman Act To Professional Sports Leagues Presents Important Questions That Have Not Been, But Should Be, Considered By This Court

Professional sports league operations are of vital interest not only to the member clubs and players but also to states,

[4] Whether there has been a violation of the antitrust laws is the sole issue presented here. It is petitioners' position that neither the Coliseum nor the Raiders has suffered compensable antitrust injury under Section 4 of the Clayton Act, 15 U.S.C. § 15, even if the claimed violation is proven. Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519 (1983); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). Those issues are presented in the appeal of the damage judgment that is pending before the Court of Appeals.

municipalities, and millions of fans and taxpayers. By one estimate, seventy percent of all professional sports facilities are publicly owned. Noll, *Government and the Sports Business* 326 (1974). Some 50 state and local governments have spent more than $6 billion in the past two decades on stadiums for professional baseball and football. S. Rep. No. 98-592, 98th Cong., 2d Sess. 2 (1984). Professional leagues in all of the major sports—football, baseball, basketball, hockey, and soccer—are necessarily joint business enterprises owned in common by the league members and governed by agreements among them.

While this Court held almost 30 years ago that professional league football is subject to the antitrust laws, *Radovich* v. *National Football League*, 352 U.S. 445 (1957), no decision of the Court provides meaningful guidance as to how Section 1 of the Sherman Act should be applied to the joint decisionmaking of professional league members.[5] As a result, the courts have struggled increasingly with the asserted applicability to sports leagues of antitrust precedent governing the actions of horizontal competitors.[6]

This lack of guidance has produced litigation chaos. Some decisions recognize that leagues are single enterprises or partnerships.[7] Others, however, have treated leagues as

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[5] Largely because of baseball's early exemption (Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922)), the first six decades of the Sherman Act's development produced no antitrust doctrine applicable to professional sports leagues.

[6] Economists and commentators have recognized the unique nature of a *league* sports product. L. Koppett, Sports Illusion, Sports Reality 285 (1981) ("The product is *not* 'The Dallas Cowboys,' getting together with another product called 'The Philadelphia Eagles.' The product is a National Football League game.") (emphasis in original); W. Neale, "The Peculiar Economics of Professional Sports," 78 Q.J. Econ. 1 (1964). *See also* WTWV, Inc. v. National Football League, 678 F.2d 142, 144-45 (11th Cir. 1982) (NFL members operate "as co-producers of a common entertainment product"); and Reynolds v. National Football League, 584 F.2d 280, 287 (8th Cir. 1978) (courts cannot ignore "the structured nature of any professional sport based on league competition").

[7] San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974); *see also* Levin v. National Basketball Association, 385 F.

(footnote continues)

"conspiracies," subjecting every type of intra-league decision or agreement to Section 1 review.[8] Three courts of appeals have done so while holding the NFL to be a joint venture and not a mere association of economic competitors.[9] But other courts have applied to league members the *per se* standards ordinarily applicable only to naked restraints among horizontal competitors.[10] Even when the interdependence of league members has been recognized, the courts have often relied on precedents involving horizontal competitor relationships, with the result that their decisions reflect no coherent antitrust doctrine.[11]

(footnote continued) .

Supp. 149, 152 (S.D.N.Y. 1974) (league members are "partners" not competitors); and Mid-South Grizzlies v. National Football League, 550 F. Supp. 558, 567-68 & n.22 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 2657 (1984).

[8] *E.g.*, Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979) (safety rule on employment of physically handicapped players); Carlock v. National Football League, No. SA-79-CA-133 (W.D. Tex. 1982) (league decision not to purchase officiating equipment).

[9] *See* North American Soccer League v. National Football League, 670 F.2d 1249, 1251 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982) ("the NFL is an unincorporated joint venture . . . ."); Smith v. Pro Football, Inc., 593 F.2d 1173, 1178-79 (D.C. Cir. 1978) ("the NFL clubs . . . are not *competitors* in any economic sense. The clubs operate basically as a joint venture . . . ."); Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (NFL has "some of the characteristics of a joint venture"); *see also* United States v. National Football League, 116 F. Supp. 319, 323-24 (E.D. Pa. 1953).

[10] *E.g.*, Linseman v. World Hockey Association, 439 F. Supp. 1315 (D. Conn. 1977); Bowman v. National Football League, 402 F. Supp. 754 (D. Minn. 1975); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971). *See also* Haywood v. National Basketball Association, 401 U.S. 1204 (1971) (Douglas, J., in chambers).

[11] *E.g.*, Smith v. Pro Football, Inc., *supra*, 593 F.2d at 1178-79, 1186-88; Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974), *jury verdict aff'd on other grounds*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *see* S. Robinson, *Recent Antitrust Developments—1979*, 80 Col. L. Rev. 1, 19-22 (1980). Some of the cases have involved league agreements limiting member club actions in the employment of players, and therefore were complicated by an issue not present in this case—the scope of the labor exemption from the antitrust laws. *See, e.g.*, McCourt v. California

(footnote continues)

The specific issue of team relocation has spawned protracted litigation, often marked more by forum shopping than by recognizable principle.[12] With respect to the Raiders' move itself, no fewer than eight suits have been prosecuted in federal and state courts, including actions by Oakland customers asserting that the Raiders' relocation restrained trade in Northern California and by Los Angeles authorities asserting that the City of Oakland's attempted acquisition of the Raiders in eminent domain violated the Clayton Act.[13] Even if the NFL had not opposed the Raiders' move from Oakland, protracted antitrust litigation would have ensued, for Oakland's public authorities would then have sued the League for establishing the remaining NFL team in Northern California—the San Francisco 49ers—as a monopoly in the Bay Area.[14] League agreements on team location are also presently the subject of federal antitrust litigation in both professional basketball and professional hockey.[15]

(footnote continued)

Sports, Inc., 600 F.2d 1193 (6th Cir. 1979). *See also* Flood v. Kuhn, 407 U.S. 258, 294-96 (1972) (Marshall, J., dissenting); J. Weistart, *Judicial Review of Labor Agreements: Lessons From the Sports Industry*, 44 L. & Contemp. Prob. 109 (1981).

[12] *See, e.g.*, State v. Milwaukee Braves, Inc., 144 N.W.2d 1 (Wis.), *cert. denied*, 385 U.S. 990 (1966); J. Weistart & C. Lowell, The Law of Sports § 5.11 at 733-35 (1979) (commenting on *Milwaukee Braves)*.

[13] Downing v. Oakland Raiders, Nos. 80-4382 & 80-4513 (9th Cir. 1983), *petition for cert. pending*, No. 83-1844; and Los Angeles Memorial Coliseum Commission v. City of Oakland, 717 F.2d 470 (9th Cir. 1983).

[14] The Raiders' proposed move—and the absence of coherent antitrust doctrine in this field—thus confronted the NFL with an extraordinary Hobson's choice. *See* "Antitrust Policy and Professional Sports," Hearings Before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee, 97th Cong., 2d Sess. 416 (1982) (testimony of Oakland Mayor Lionel Wilson).

[15] The San Diego Clippers franchise of the National Basketball Association has relocated to Los Angeles for that league's 1984 season. That relocation is being challenged in National Basketball Association v. SDC Basketball Club, Inc., No. 84-1430 B (CM) (S.D. Cal.). The National Hockey League's rejection of a proposal by its St. Louis member to sell its franchise for transfer to a Canadian city is being challenged in federal court in Missouri. Ralston Purina Co. v. National Hockey League, No. 83-1264-C(3) (E.D. Mo.).

Confusion as to the validity of the NFL location agreement under the antitrust laws has, in addition, produced governmental action at the state level—principally expansive assertions of eminent domain authority for municipal acquisitions of professional sports franchises. The City of Oakland is pursuing such an eminent domain suit to return the Raiders to Oakland. *See City of Oakland* v. *Oakland Raiders,* 32 Cal.3d 60, 183 Cal. Rptr. 673 (1982). But the Ninth Circuit's decision in this case has recently been interpreted by a California trial court to pose serious impediments to the City's eminent domain suit.[16]

As a result of the Ninth Circuit's decision in this case, the NFL's Baltimore Colts unilaterally elected to relocate to Indianapolis after years of League operations in Baltimore. As to that move, no fewer than five actions are pending, including a federal interpleader action positing mutually exclusive claims of Indianapolis and Baltimore to the Colts' franchise,[17] a Section 1983 suit against Baltimore public officials,[18] and federal court actions against both the Colts and the NFL asserting eminent domain claims under emergency Maryland legislation.[19]

The impact of the decisions below on state, municipal, and public interests has given rise to deep Congressional concern.[20] Hearings in the current session concerning the validity of sports

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[16] City of Oakland v. Oakland Raiders, No. AO 76044 (Cal. Super. Ct., July 20, 1984), slip op. at 14, 25, *petition for writ of mandate and application for injunctive relief pending in California Supreme Court,* No. S.F. 24778.

[17] *See* Indianapolis Colts v. Mayor and City Council of Baltimore, No. IP 84-652-C (S.D. Ind.), *stay of injunction issued,* 733 F.2d 484 (7th Cir.), *application for order vacating stay denied,* No. A-1014 (U.S., June 14, 1984), *order granting injunction rev'd,* No. 84-1649 (7th Cir., August 10, 1984).

[18] Indianapolis Colts v. Mayor and City Council of Baltimore, No. B 84-2560 (D. Md.).

[19] Mayor and City Council of Baltimore v. Baltimore Football Club, Inc., No. B-84-1294 (D. Md.); Mayor and City Council of Baltimore v. National Football League, No. B-84-2026 (D. Md.). *See also* In re Baltimore Football Club, Inc., Debtor, No. 84-B-0526 (D. Md.) (bankruptcy petition filed to bar Colts' removal from Maryland).

[20] *See* 128 Cong. Rec. S. 9329-331 (daily ed., July 28, 1982); 128 Cong. Rec. S. 15783-784 (daily ed., December 20, 1982); 128 Cong. Rec. H. 2412 (daily ed., May 21, 1982); and "Antitrust Policy and Professional Sports," Hearings, *supra* n.14.

league location agreements have produced a recognition that the issues raised by the rulings below "present basic and important questions of Federal statutory law that should be considered and resolved by the Supreme Court." [21]

The respondent Raiders is the first professional sports league member to challenge a league agreement as an asserted independent horizontal competitor of each other member, while simultaneously asserting that all members remain fully obligated to conduct joint business operations with it on agreed terms. The decisions below thus treat a member of a single enterprise as a "competitor," in complete disregard of true business competition that the Sherman Act protects. *Compare Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 20-23 (1979).

The need for guidance in the application of Section 1 to sports league agreements is well illustrated in the majority opinion below. It explicitly conceded that professional football is "an industry which does not readily fit into the antitrust concept," and observed that while Section 1's purpose is to prohibit agreements among competitors, it nonetheless applies here even though ". . . the NFL teams are not true competitors, nor can they be." (15a.) The majority further described the NFL as a "unique business organization to which it is difficult to apply antitrust rules which were developed in the context of arrangements between actual competitors." (33a.) The inappropriateness of existing antitrust precedent, convincingly shown in the opinion of the dissenting judge below, was thus also acknowledged by the panel majority.[22]

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[21] *See* proposed H. Res. 574 (1984), Cong. Rec. H. 9062 (daily ed., August 10, 1984). *See also* Senate Comm. on Commerce, Professional Sports Team Community Protection Act, S. Rep. No. 98-592, 98th Cong., 2d Sess. 14 (1984). Pending legislative proposals do not "address (and therefore will not provide a remedy to) the antitrust problems raised by the ninth circuit decision," but instead entail government regulation with special grants of District Court jurisdiction for judicial review. *Id.* at 18.

[22] The majority seriously misconceived league operations in stating that the league "structure is very similar to that in" United States v. Sealy, Inc., 388 U.S. 350 (1967). In *Sealy* each of 30 licensees independently manufactured and sold mattresses under the Sealy name and agreed not to compete

(footnote continues)

While the courts have struggled with agreements among professional league members, commentators have urged express judicial recognition that certain league agreements cannot be tested under standard "conspiracy" concepts. For example, Professor Bork, now judge of the Court of Appeals for the District of Columbia Circuit, has observed that "the concept of business competition may be irrelevant as applied to the relationship between members of a league." R. Bork, *Ancillary Restraints and the Sherman Act,* 15 ABA Antitrust Law Section 211, 233 (1959).[23]

The leading academic treatise on sports law also recognizes that the inherent "jointness" of professional sports leagues and the absence of intra-league business competition make it inappropriate to subject leagues to conspiracy "principles designed to control the behavior of firms which are fundamentally different. In its basic nature, a league-firm is not a conspiracy. To treat it as such is to force results which are unlikely to achieve any purpose intended by Congress." J. Weistart & C. Lowell, *The Law of Sports* § 5.11, at 757-58 (1979). And a

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(footnote continued)

with each other. There was no requirement of joint production and the agreement combined otherwise independent sources of economic power. Here the challenged agreement determines the locations at which all league members conduct their joint operations, and the league product is necessarily produced on a joint basis by the NFL members as their sole product. For the same reasons, the majority's reliance upon United States v. Topco Associates, Inc., 405 U.S. 596 (1972), was similarly misplaced.

[23] Professor Bork has also stated:

> "There are some activities . . . which could not exist at all without the restraint and these should be lawful no matter what the market share of the parties. A prime example is league sports . . . . Sooner or later the [Supreme] Court is going to have to face the issues raised by the restraints in organized sports, and this solution [agreements permitted within a single league] seems to me dictated by the needs of leagues and by the analogy of the league to partnerships or firms." R. Bork, *Resolved: Present Antitrust Restraints on Pricing Should be Relaxed,* 41 A.B.A. Antitrust L.J. 5, 13 (1971).

See also M. Grauer, *Recognition of the National Football League as a Single Entity under Section 1 of the Sherman Act: Implications for the Consumer Welfare Model,* 82 Mich. L. Rev. 1 (1983).

knowledgeable commentator has found "something drastically wrong with a methodology" of antitrust decision that, while holding league members "not competitors in any economic sense" (*Smith* v. *Pro Football, Inc., supra,* 593 F.2d at 1178-1179), applies routine Section 1 standards to professional sports league issues. S. Robinson, *Recent Antitrust Developments-1979,* 80 Col. L. Rev. 1, 21-22 (1979).[24]

This Court's decision last Term in *National Collegiate Athletic Association* v. *Board of Regents,* 104 S. Ct. 2948 (1984), underscores the need for guidance in the application of Section 1 to sports leagues. The NCAA television plan, adopted by the NCAA's 800 member institutions, concededly constituted a conspiracy or combination within Section 1 of the Sherman Act. 104 S. Ct. at 2959. The television plan restrained competition *among* leagues on an *inter*-league level, not merely *within* a conference or league. *Id.* at 2967. However, in condemning that plan, the Court indicated that the antitrust laws were not offended by rules defining "the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture." 104 S. Ct. at 2969. The location agreement challenged here relates precisely to the sharing among NFL members of "the responsibilities and the benefits of the total venture."

With respect to team location, the members of a league function as a single firm deciding where its business is to be located. *See* J. Weistart & C. Lowell, *supra,* at 698-701. Agreement on team location is central to the operation of a league. It serves as a principal incentive for member investment in the league enterprise and in the operation of each member club in its designated community. It further protects the interest of each member in the balanced location of all teams, enabling the league to make judgments on the preferred location of each team to maximize public interest in the league product and the members' shared benefits. Other limitations on unilateral member action are also inherent in the functioning of

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[24] A respected observer of professional sports has concluded that current antitrust uncertainty places "an unfair burden on this industry" and thus "cries out for clarification." L. Koppett, *Sports Illusion, Sports Reality* 282 (1981).

a professional league. To produce a league product, the members must operate pursuant to many agreements diminishing "competition" among them.[25] As Professor Bork has put it, "[a]greements to refuse to deal are essential to the effectiveness and sometimes to the existence of many wholly beneficial economic activities. All league sports from the Ivy League to the National Football League, an increasingly wider spectrum, rest entirely upon the right to boycott." R. Bork, *The Antitrust Paradox* 332 (1978); *see also id.* at 278-79.

What is required here is a reasoned analysis of this "unique business organization," as the Court of Appeals described the NFL, and a principled determination of whether antitrust rules developed for "arrangements between actual competitors" (33a) apply to agreements among league members designating the locations of league operations.

II. The Decisions Below Erroneously Treat The Intra-Enterprise Conspiracy Doctrine As Dispositive

This Court's decision in *Copperweld Corp.* v. *Independence Tube Corp.*, 104 S. Ct. 2731 (1984), thoroughly discredits the principal cases invoked by the courts below in concluding that precedent requires the NFL location agreement to be viewed as a conspiracy among independent competitors falling within Section 1 of the Sherman Act. Despite explicit acknowledgment that the NFL's members cannot be true economic competitors (pp. 5, 11, *supra*), both courts found determinative for Section 1 analysis the separate organization (as a corporation or partnership) of each NFL member and the absence of direct profit or loss sharing in an accounting or balance sheet sense. (11a-12a; 54a.) These wholly formal aspects of separateness led both courts to read this Court's "intra-enterprise conspiracy" decisions as requiring that the NFL's members be

[25] For example, league members agree to produce a maximum number of games in each season; to present games against certain member teams but not against others; to operate in divisions and conferences that require members to deal with certain members while preventing them from dealing with other members not scheduled for divisional or conference play; and to designate the location of each team's "away" games in a manner that prevents individual clubs from unilaterally selecting the locations at which they will play.

treated as horizontal competitors whose internal agreements are subject to rule of reason scrutiny under Section 1.

The District Court viewed four decisions of this Court as demanding such a result.[26] The two most recent of these decisions, *Perma Life Muffler* and *Timken Roller Bearing,* were also relied on by the Court of Appeals' majority, which acknowledged that while "these cases and others have been the subject of some criticism, . . . they remain the law." (9a-10a.)

Moreover, it was not the logic of these precedents that led to the judgment below, but rather their mere presence on the books. Thus, the majority noted that a district court had held a hockey league's team location agreement not to be a conspiracy under Section 1 and that the members' refusal to approve a team's relocation did not restrain business competition among the members. *San Francisco Seals, Ltd.* v. *National Hockey League,* 379 F. Supp. 966 (C.D. Cal. 1974). (13a, n.4.) While the majority found this decision and a law review article approving its analysis "persuasive," [27] it concluded "that existing precedent" could not be "ignored." *(Id.)*

The four decisions that thus provided the major legal support for the rulings below constitute the source of the so-called intra-enterprise conspiracy doctrine—that separate incorporation even within a parent-subsidiary relationship supports the application of conspiracy principles under Section 1. In *Copperweld,* this Court rejected that doctrine; with respect to these four decisions, this Court said: "To the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled." 104 S. Ct. at 2745.

In view of the weight accorded these decisions by the courts below, this Court's intervening decision in *Copperweld,* without more, warrants review of this important court of appeals' decision that expressly and fundamentally rests upon now-discredited precedents.

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[26] 54a-55a, *citing* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); and United States v. Yellow Cab Co., 332 U.S. 218 (1947).

[27] *See* Grauer, *supra,* n.23.

III. The Decisions Below Exalt Form Over Substance And Conflict With This Court's Decisions Governing The Application Of Section 1 Of The Sherman Act To Jointly Conducted Operations

A. *Copperweld* And Related Decisions

This Court's analysis in *Copperweld* leaves no doubt that both courts below erroneously ignored economic substance and permitted purely formalistic considerations to govern the application of Section 1 to the NFL team location agreement. That analysis was not novel. Several terms earlier, in *United States* v. *Citizens & Southern National Bank,* 422 U.S. 86, 119 (1975), the Court characterized as a "total lack of realism" a claim that a common enterprise consisting of a parent bank and several separate banks in which the parent held five percent stock interests was a conspiracy in violation of Section 1.[28] Previously, in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prod. Co.,* 370 U.S. 19, 29 (1962), the Court dismissed a Section 1 charge against several thousand growers on the ground that they were "in practical effect and in the contemplation of the statutes" an "organization" or "association" even though they have "formally organized themselves into three separate legal entities."

The central criticism of the intra-enterprise conspiracy doctrine, the Court noted in *Copperweld,* was that it treated "as the concerted activity of two entities what is really unilateral behavior flowing from the decisions of a single enterprise." 104 S. Ct. at 2740. That reasoning is directly applicable to the NFL; the members have of necessity combined into a lawful and procompetitive joint enterprise solely to engage in the production of a single product—NFL football. The challenged location agreement is a fundamental element of that enterprise. The Court further emphasized that conspiracy results only when "two or more entities that *previously pursued their own interests separately* are combining to act as one for their common benefit." *Id.* at 2741 (emphasis supplied). The NFL

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[28] The Court reached this conclusion notwithstanding the independent decisionmaking authority of the banks on such matters as loan policies, setting of interest rates, personnel policies, and the like. *See* 422 U.S. at 113.

members are not entities that "previously pursued their own interests separately"; indeed the success or failure of the individual members as business organizations is inextricably tied to the success of the NFL. In holding that the NFL members were conspirators under Section 1, while acknowledging that "[t]he NFL teams are not true competitors, nor can they be," the majority below surely looked "to the form of an enterprise's structure and ignore[d] the reality." *Id.* at 2743. This is the very analytical approach condemned in *Copperweld.*

The NFL, as the courts below recognized, was not organized by independent competitors as a trade association or to limit output, fix prices, allocate territory, or restrain competition in markets for a product or service that each would otherwise produce independently.[29] It was organized to create and develop a product that had never before existed, that could not be produced by any single member, and that is produced through a unique league organization. The majority itself recognized that the "combination"—the NFL itself—was entirely legal. (23a.) The NFL is thus an example, as the Court put it in *Copperweld,* of the "increasing complexity of corporate operations"; accordingly, it "should be free to structure itself in ways that serve efficiency of control, economy of operation, and other factors dictated by business judgment without increasing its exposure to antitrust liability." *Id.* at 2743.

There can be no question as to the sweep of the decision of the court below. Everything a league and its members do is accomplished by agreement or joint decision of the members.

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[29] The majority's concern that collective action by the league members would allow them "to extract excess profits" and charge "unreasonable and arbitrary prices" (16a) bears no relation to the issues in this case. It was not even charged, let alone proven, that enforcement of the league location agreement would have such an effect. The majority noted two areas of off-the-field competition between the NFL members: (1) for players, coaches, and management personnel and (2) for fan support, media space, and revenues where two teams operate in close proximity. Only the latter has any relevance in assessing the competitive impact of the team location agreement challenged here. Such "competition," apart from being a wash in this case in that the Raiders would operate either in Northern California in a two-team NFL area or in Southern California in an equivalent two-team area, is wholly incidental in the production of a league product.

As the dissenting judge recognized, the majority holding "is tantamount to ruling that the NFL structure is itself *per se* invalid under the Sherman Act § 1" and "will spell the end of sporting leagues." (47a-48a.)

The dissenting judge also made clear that the issue here is not immunity from Section 1 but rather the proper application of Section 1 to parties, however formally organized, engaged in a legitimate joint enterprise. He viewed Section 1 as fully applicable to league agreements that impinge on activities "outside the confines of intra-league regulation of production of the sport;" but he recognized that Section 1 does not apply to regulations that directly involve only the joint production of NFL football and control all the members in their joint engagements. (44a.) The issue here relates to the members' functioning as joint producers of NFL football in a broad entertainment market, not to individual operations of the clubs in markets in which each is a buyer of services such as those of player-employees. To the extent an intra-league agreement restrains trade with outside competitors of the League or its members, the League and its members would be answerable under Section 1 of the Sherman Act.[30] And the League would remain subject to the full sweep of Section 2 of the Act.

The dissenting judge thus perceived that a challenge to an intra-league agreement that relates solely to the joint production of league football demands an inquiry into the nature of the league, as a productive enterprise, rather than into the formalities of the members' organization or profit accounting.[31]

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[30] In a case that the NFL submits was an erroneous application of this principle, North American Soccer League v. National Football League, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982), an NFL regulation was condemned because it was held unreasonably to restrain competition between professional football and professional soccer by restricting investment in the latter. The League urged, and Justice Rehnquist agreed (459 U.S. 1074, 1077), that the Court of Appeals erred in concluding that the regulation in question violated the rule of reason.

[31] Unlike the defendants in Associated Press v. United States, 326 U.S. 1 (1945), and Silver v. New York Stock Exchange, 373 U.S. 341 (1963), the NFL members have not joined together to provide a service that merely facilitates the conduct of the independent business activities of each member.

(footnote continues)

Such an inquiry is strikingly similar to that made by this Court in *Copperweld* in rejecting the intra-enterprise conspiracy doctrine. There the Court granted no immunity from Section 1, but simply confined that Section, as intended by Congress, to agreements that brought together sources of economic power that had previously been truly independent. 104 S. Ct. at 2740-41, 2744. The agreement among NFL members as to where each will participate jointly with other League members in producing a common product does not represent such a bringing together of sources of economic power that are truly independent.

In 1966, Congress examined the operations of sports leagues and enacted antitrust exemption legislation in clear recognition of the joint nature of league operations. That statute authorized the consolidation of the two existing professional football leagues into a single league, the NFL. (97a.) [32] Congress conditioned approval of the consolidation upon a requirement that the "expanded single league" increase the total number of teams previously operating, *id.*, and the leagues committed that no club would be relocated as a result of the consolidation. *See* Hearings before the Antitrust Subcommittee of the House Judiciary Committee, 89th Cong., 2d Sess. 80-83 (1966). While this action by Congress does not accord antitrust exemption to any league actions other than the consolidation of the two leagues, it demonstrates congressional acknowledgment of the appropriateness of joint league determination of team locations.

The majority below viewed the NFL's operation essentially as Congress did in 1966. Thus, the majority expressed

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The NFL members produce no product on their own as did the newspapers and stock brokers involved in those cases. They are joined together in the NFL for the sole purpose of producing the single product in which all are jointly engaged.

[32] Absent such legislation, the combination of the two leagues into a single enterprise would have been subject to a rule of reason inquiry. Once the legality of the enterprise or joint venture is determined, however, joint decisions that are necessarily made in the conduct of the enterprise are not subject to such an inquiry.

agreement that "the nature of NFL football requires some territorial restrictions" and "some control over the placement of teams to ensure NFL football is popular in a diverse group of markets." (23a, 24a.) The majority's ultimate decision, however, was founded on the lack of "express recognition" of "objective factors" and a "procedural mechanism to ensure consideration" of such factors in team location decisions. (26a-27a.) But these factors are quite irrelevant to the antitrust analysis. If league members are not competitors but are engaged in a joint enterprise, league limitations and controls with respect to team locations are inherent in the joint production of their common product, and are not conspiracies condemned by Section 1. Stated differently, the issue under Section 1 is whether the league agreement on team location constitutes a restraint of *competition among true competitors*—not whether it limits individual members' freedom of choice or guarantees some nebulous form of commercial due process.[33]

B. Decisions Establishing Ancillary Restraint Principles

The decisions below conflict with settled principles established in the early years of Sherman Act jurisprudence concerning the relationship of the common law of trade restraints to the ambit of Section 1 of the Act. The "broad mandate" of the Sherman Act is to be interpreted "by drawing on common-law tradition." *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 688 (1978). As has been noted,

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[33] Citing Murray v. Toyota Motor Distributors, Inc., 664 F.2d 1377, 1379 (9th Cir.), *cert. denied,* 457 U.S. 1106 (1982), all three Court of Appeals judges agreed that the NFL members' capacity to conspire for Section 1 purposes in agreeing upon team locations was a jury question unless it presented an issue upon which reasonable men could not differ. (7a-8a, 38a.) The trial court, however, took this question from the jury even though that court repeatedly recognized it as a "close" question (54a), and the judges on the Court of Appeals differed sharply on how it should be answered. At a minimum, therefore, and particularly in light of the intervening decision of this Court in *Copperweld,* petitioners are entitled to a jury trial with proper instructions on the question whether the league agreement on team location combines previously competing economic sources of power as articulated in *Copperweld.*

professional sports leagues are common enterprises in the nature of a partnership or joint venture.[34] At common law, members of partnerships were not allowed to compete against the firm in the production of the firm's product. *Wheeler* v. *Sage,* 1 Wall. (68 U.S.) 518 (1863); *Latta* v. *Kilbourn,* 150 U.S. 524 (1893). According to the Court in *Latta,* it was "well settled that one partner cannot . . . carry on another business in competition or rivalry with that of the firm . . . " *Id.* at 541. Since the common law affirmatively prohibited competition by partners against the firm, courts had no difficulty holding that such restraints were not "restraints of trade" that would make them unenforceable as against public policy. *Matthews* v. *Associated Press,* 136 N.Y. 333, 32 N.E. 981 (1893); *Dolph* v. *Troy Laundry Mach. Co.,* 28 F. 553 (N.D N.Y. 1886).

Shortly after enactment of the Sherman Act, its broad language and the Court's decision in *United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290 (1897), apparently holding every agreement in restraint of trade to be within the ban of the Act, led to concern that Section 1 might prohibit restraints recognized as lawful at common law. The Court promptly addressed this concern in *United States* v. *Joint Traffic Ass'n,* 171 U.S. 505 (1898), where it found that restraints such as those inherent in the formation of business partnerships had "never . . . been regarded in the nature of a contract in restraint of trade or commerce." Accordingly, they are not contracts "in restraint of trade" reviewable under the Sherman Act. *Id.* at 567.

In the same year, Judge Taft also found that covenants by partners not to compete with each other or with the firm are not subject to the Sherman Act, but he did so through a different analysis. *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899). Judge Taft reasoned that certain restraints were not covered by the Act's broad language because they were "ancillary restraints," *i.e.,*

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[34] The terms are synonymous for purposes of antitrust analysis. Arizona v. Maricopa County Medical Society, 457 U.S. 332, 356 (1982); United States v. Morgan, 118 F. Supp. 621, 690 (S.D.N.Y. 1953). *See also* the decisions cited in nn. 7 and 9, *supra.*

restraints designed to effectuate the main purpose of a lawful common enterprise or contract. Such covenants are lawful when "necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract." *Id.* at 282.[35]

What remained for this Court's final determination was whether every restraint that did fall within the Sherman Act was automatically unlawful as suggested by the earlier *Trans-Missouri* and *Joint Traffic* decisions. That issue was resolved in *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911), in which the claimed illegal action was entirely unrelated to what the Court had previously held was not a "restraint of trade" at all or what Judge Taft had termed "ancillary restraints." *Standard Oil* thus established that "*non*ancillary restraints" when reasonable were lawful under Section 1 (*see* P. Areeda, *Antitrust Analysis* 320 (3d ed. 1980)), and its rule of reason test was adopted as the criterion for judging the legality of such nonancillary restraints.

The Court of Appeals' majority found that the NFL was a lawful and procompetitive enterprise, and the majority had "no reason to doubt" that the league location agreement was ancillary thereto. (23a.) However, in affirming the application of a *Standard Oil* rule of reason test to a covenant among the participants in the NFL enterprise, the majority misconceived both the ancillary restraints doctrine and the consequence of its ancillarity finding. Moreover, it required the ancillary location agreement to survive a "less restrictive alternative" analysis of questionable validity even as to agreements not involving co-venturers. (24a-25a.)[36] The basis for holding ancillary restraints lawful was summarized by Judge Taft as follows:

> " . . . when two men became partners in a business, although their union might reduce competition, this

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[35] As Justice Holmes later wrote in connection with a restraint ancillary to the sale of the goodwill of a going business, "there has been no intimation from anyone . . . that such a contract . . . would fall within the act." It "is not within the letter or spirit of the statute." Cincinnati Packet Co. v. Bay, 200 U.S. 179, 185 (1906).

[36] In Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 n.29 (1977), the Court stated that a restraint may be reasonable even though it is

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> effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged." *United States* v. *Addyston Pipe & Steel Co., supra,* 85 F. at 290.

Such a restraint must be "reasonable" in scope and serve the lawful purpose of the main contract.

Such requirements are not, however, synonymous with the rule of reason written into the Sherman Act by *Standard Oil.*[37] That standard cannot be applied by rote to covenants in a necessarily joint, lawful enterprise that establish the terms of each participant's role in the joint operation. As to such enterprises, the ancillarity doctrine conclusively recognizes that the participants must act jointly to achieve their valid main purpose (here, the joint production of NFL football); to the extent that the functioning of such a procompetitive enterprise entails agreements eliminating "competition" in the production of the joint product, those agreements are lawful as a matter of law if "reasonable" in scope and directed to achieving the lawful main purpose.

The majority below thus erred in testing the NFL's ancillary location agreement by the extent of its impact on "direct competition" between NFL members in the production of NFL football or by whether it promotes "free competition"

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"neither the least nor the most restrictive provision . . . ." Contrary to the suggestion of the Court of Appeals' majority (24a), Justice Rehnquist found serious fault with the Second Circuit's application of a less restrictive alternative standard in another NFL case. National Football League v. North American Soccer League, *supra,* 459 U.S. at 1079-80.

[37] As summarized in National Society of Professional Engineers v. United States, *supra,* 435 U.S. at 688, a case involving price restraints among competitors, that inquiry is required to focus "directly on the challenged restraint's impact on competitive conditions."

between a League member and the League partnership itself. (23a.) Such ancillary restraints among partners or participants in a common enterprise are lawful even when they limit or eliminate competition in the production of a joint product or service. As Judge Taft emphasized, the justification for such covenants lies in their creation of a lawful enterprise competitive with *other* firms and in their securing the participants' "entire effort in the common enterprise . . .." 85 F. at 290.

Despite Justice Rehnquist's recent recognition that the ancillary restraints doctrine may validate agreements among NFL members, *National Football League* v. *North American Soccer League, supra*, 459 U.S. at 1077-79, the majority below persisted in applying a conventional rule of reason analysis rather than recognizing that the NFL location agreement is simply not a restraint among business competitors within the ambit of Section 1. The approach of the majority, its passing reference to the *Addyston Pipe* decision, and its deprecating reference to the ancillary restraints concept as "inventive" and a "little used area of antitrust law" (22a) illustrate the thorough confusion among the federal courts as to the status of ancillary restraints under the Sherman Act.[38] The application of the ancillary restraints doctrine to professional sports league location agreements merits this Court's consideration and clarification.

IV. The Rule Of Reason Inquiry Was Both Unwarranted And Conducted In Conflict With Settled Requirements

Both the Court of Appeals' majority and the District Court attempted, by invoking the rule of reason, to alleviate the obvious logical discomfort they experienced in holding that the NFL members must, as a matter of law, be treated as economic competitors even though they are not. With paeans to its vaunted flexibility, they treated the rule of reason as a universal solvent capable of resolving all manner of questions under Section 1 of the Sherman Act. In doing so, they

[38] *See* M. Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do* Sealy *and* Topco *Logically Survive* Sylvania *and* Broadcast Music, 66 Va. L. Rev. 879 (1980).

misapprehended the scope and standards of Section 1 as well as the traditional function of the court in deciding whether and how a claim should be submitted to a jury.

Section 1 does not impose an all-purpose antitrust regimen. *Copperweld* demonstrates that it was the obligation of the courts below to focus on whether the league location agreement constituted an arrangement among previously competing economic interests. 104 S.Ct. at 2741. In addition, as the dissenting judge below emphasized (36a-37a), if the league location agreement was to be subjected to rule of reason scrutiny, that review had to be conducted in accord with established Section 1 requirements. Neither of the courts below observed or satisfied these standards.

In *Copperweld,* this Court confirmed that a rule of reason evaluation requires "an inquiry into market power and market structure designed to assess the combination's actual effect." 104 S. Ct. at 2741.[39] An antitrust plaintiff must therefore prove a relevant product market before a court or jury can determine whether defendants have unlawful power over price, competition, or production. *United States* v. *E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 392-93 (1956). In the present case, the Court of Appeals' majority acknowledged that proof of "an impact on competition in a relevant market is an absolutely essential element of a rule of reason case . . . ." (15a.) Nonetheless, it sustained the finding that the NFL location agreement was unreasonable even while concluding that, due to a lapse by respondents' counsel, respondents *never* "placed before the jury" their critical evidence on relevant market. (17a.) The evidence omitted from respondents' presentation consisted of expert testimony that was to be devoted to proof of relevant market and the alleged impact of the NFL location agreement on competition. The majority expressed "surprise" that respondents' counsel "would neglect such important evidence." (*Id.*)

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[39] Such an inquiry examines the actual effects on "competitive conditions" (National Society of Professional Engineers v. United States, *supra,* 435 U.S. at 688) and on "market considerations" that provide "objective benchmarks." Continental TV, Inc. v. GTE Sylvania Inc., *supra,* 433 U.S. at 53 n.21.

Given respondents' failure to present their critical relevant market evidence, the dissenting judge found that the majority opinion flouted settled requirements of proof of market definition, and observed that the majority had strained to cover respondents' failure of proof by "restat[ing] the manner in which relevant market is to be proven in this Circuit. . . ." (37a.) He further challenged the majority's implication that a plaintiff "may discharge its burden of establishing the relevant product and geographic markets by a theoretical argument to the court, rather than by presenting evidence to a jury." (*Id.*) The dissent concluded that "this lynchpin of [the majority's] 'rule of reasonableness' cannot pass as innocuously by long-standing precedent as the majority would have it." (*Id.*)

In recognition of respondents' failure to present their critical proof on the relevant market issues, the majority offered a novel, alternative justification for sustaining the jury's verdict. It first observed that in "the context of this case in particular, we believe that market evidence, while important, should not become an end in itself" because "the exceptional nature of the industry makes precise market definition especially difficult." (21a.) Without explaining or elaborating on this hypothesis, the majority concluded that the market definition issue was essentially resolved by the District Court's holding that the NFL location agreement is, as a matter of law, a conspiracy among economic competitors within Section 1. Observing that to "a large extent the market is determined by how one defines the entity," the majority concluded that if the NFL consists of "28 individual entities which compete with one another both on and off the field for the support" of consumers, then traditional requirements of proof of relevant market do not have to be satisfied. The majority found that "because of the exceptional structure of the League, it was not necessary for the jury to accept absolutely either the NFL's or the plaintiff's [sic] market definitions." (*Id.*) In this manner, the Court of Appeals ruled that the District Court's decision on the conspiracy issue, which itself rested on now-overruled intra-enterprise conspiracy precedents, eliminated or diluted settled requirements of proof of relevant market in a rule of reason case.

The submission of the rule of reason issues by the trial court was in clear conflict with settled principle. That court applied the rule of reason as if the NFL members were competing automobile dealers or motion picture producers, requiring the members of the common enterprise to demonstrate that their challenged location agreement was more pro-competitive than anti-competitive within the league venture itself. The District Court repeatedly refused to instruct the jury to assess the *net* competitive effects of the League's location agreement by balancing the intra-NFL (*i.e.*, intrabrand) restraint with interbrand competitive benefits. *See Continental TV, Inc.* v. *GTE Sylvania Inc., supra,* 433 U.S. at 54-56.[40]

Lawful joint enterprises, such as professional sports leagues, serve to combine the actions of the participants rather than to promote business competition among them. And it is "the enforceability of [such] commercial agreements [that] enables competitive markets—indeed, a competitive economy—to function effectively." *National Society of Professional Engineers* v. *United States, supra,* 435 U.S. at 688. When a joint enterprise is concededly lawful, it has thus been understood that the legality of agreements on basic matters such as the locations of the participants' joint operations turns on the venture's impact on competing businesses. *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 168-69 (1964); *Arizona* v. *Maricopa County Medical Society, supra,* 457 U.S. at 355-57;

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[40] The trial court permitted the jury to treat the NFL alone as a relevant product market and to find the League's location agreement unlawful unless its procompetitive "benefits that . . . tend to promote competition in the industry" outweighed any restraining effects in the same "industry," *i.e.*, the League itself. 32 Tr.2d 7216. Nor would the court instruct the jury to balance the pro-competitive benefits in Northern California of the Raiders remaining in that area against any restraining effects in the Los Angeles area. These rulings reflected the trial court's conviction, expressed in its opinions, that the controlling issue was the potential for the NFL location agreement to suppress intra-NFL Raiders-Rams competition in the Los Angeles area. (59a; 66a; 84a & n.12.) Despite these trial rulings, the Court of Appeals' majority sustained the jury's verdict on the speculative hypothesis that the jury *could have* balanced the competitive benefits of the NFL agreement in an interbrand market against any restraining effect within the intra-NFL market—a hypothesis that the majority regarded as "critical" to its decision. (21a.)

see also United States v. *Columbia Steel Co.*, 334 U.S. 495, 521-24 (1948). It has never been thought that such a lawful venture can be treated as a relevant market unto itself—as the NFL was treated in this case—or that internal agreements are to be judged by rule of reason standards applicable to dealings among horizontal business competitors—as was done in this case.

The antitrust laws deal with a broad spectrum of business relationships—from horizontal competitor relationships and trade associations, through partially integrated enterprises and joint ventures of businesses independently producing separate products, to partnerships and unitary corporations. Although the courts below acknowledged that the NFL is an "exceptional" and "unique" integrated enterprise whose members are "not true competitors, nor can they be," they nonetheless applied the rule of reason to an internal NFL agreement on an unreasoned assumption that the League members stand at the horizontal competitor end of the spectrum.

The established requirements that the *court* decide questions of law and that jury verdicts must be held to some objective standards of proof were not respected in the submission of the present claims to the jury. Moreover, these requirements were essential in this case, where, in view of the admittedly "difficult" burden of applying antitrust rules developed in other contexts, a Los Angeles jury was effectively asked to decide whether it was reasonable to continue a successful professional football team in Oakland rather than have it operate in Los Angeles, where the case was tried. There can be little doubt how an Oakland jury would have answered that question. This is particularly so in view of the amorphous instructions in this case and the absence of any focus on the actual competitive effects of the challenged NFL decision. In these circumstances, preservation of the rule of law demands that legal questions, such as the scope of Section 1 of the Sherman Act, be resolved on the basis of economic substance and pertinent precedent. It also demands that settled rule of reason requirements be enforced rather than waived on the theory that "the exceptional nature of the industry" makes compliance with those requirements "especially difficult." (21a.)

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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APPENDIX A

APPENDIX A

United States Court of Appeals

NINTH CIRCUIT

Nos. 82-5572 to 82-5574, 82-5664, 82-5665, 83-5714, 83-5732 and 83-5938
Argued and Submitted April 7, 1983
Decided Feb. 28, 1984

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff-Appellee,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Defendants/Cross-Defendants-Appellants/Cross-Appellees.

Before:

ANDERSON and NELSON,
Circuit Judges,

and WILLIAMS,
*District Judge.**

Appeals from the United States District Court for the Central District of California.

J. BLAINE ANDERSON, *Circuit Judge:*

These appeals involve the hotly contested move by the Oakland Raiders, Ltd. professional football team from Oakland, California, to Los Angeles, California. We review only the liability portion of the bifurcated trial; the damage phase was concluded in May 1983 and is on a separate appeal. After a thorough review of the record and the law, we affirm.

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* The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

I. FACTS

In 1978, the owner of the Los Angeles Rams, the late Carroll Rosenbloom, decided to locate his team in a new stadium, the "Big A," in Anaheim, California. That left the Los Angeles Coliseum without a major tenant. Officials of the Coliseum then began the search for a new National Football League occupant. They inquired of the League Commissioner, Pete Rozelle, whether an expansion franchise might be located there but were told that at the time it was not possible. They also negotiated with existing teams in the hope that one might leave its home and move to Los Angeles.

The L.A. Coliseum ran into a major obstacle in its attempts to convince a team to move. That obstacle was Rule 4.3 of Article IV of the NFL Constitution. In 1978, Rule 4.3 required unanimous approval of all the 28 teams of the League whenever a team (or in the parlance of the League, a "franchise") seeks to relocate in the home territory of another team. Home territory is defined in Rule 4.1 as

> the city in which [a] club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city . . . .

In this case, the L.A. Coliseum was still in the home territory of the Rams.

The Coliseum viewed Rule 4.3 as an unlawful restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and brought this action in September of 1978. The district court concluded, however, that no present justiciable controversy existed because no NFL team had committed to moving to Los Angeles. 468 F.Supp. 154 (C.D.Cal.1979).

The NFL nevertheless saw the Coliseum's suit as a sufficient threat to warrant amending Rule 4.3. In late 1978, the Executive Committee of the NFL, which is comprised of a voting member of each of the 28 teams, met and changed the

rule to require only three-quarters approval by the members of the League for a move into another team's home territory.[1]

Soon thereafter, Al Davis, managing general partner of the Oakland Raiders franchise, stepped into view. His lease with the Oakland Coliseum had expired in 1978. He believed the facility needed substantial improvement and he was unable to persuade the Oakland officials to agree to his terms. He instead turned to the Los Angeles Coliseum.

Davis and the L.A. Coliseum officials began to discuss the possibility of relocating the Raiders to Los Angeles in 1979. In January, 1980, the L.A. Coliseum believed an agreement with Davis was imminent and reactivated its lawsuit against the NFL, seeking a preliminary injunction to enjoin the League from preventing the Raiders' move. The district court granted the injunction, 484 F.Supp. 1274 (1980), but this court reversed, finding that an adequate probability of irreparable injury had not been shown. 634 F.2d 1197 (1980).

On March 1, 1980, Al Davis and the Coliseum signed a "memorandum of agreement" outlining the terms of the Raiders' relocation in Los Angeles. At an NFL meeting on March 3, 1980, Davis announced his intentions. In response, the League brought a contract action in state court, obtaining an injunction preventing the move. In the meantime, the City of Oakland brought its much-publicized eminent domain action against the

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[1] Rule 4.3 originally read:

> Any transfer of an existing franchise to a location within the home territory of any other club shall only be effective if approved by a unanimous vote; any other transfer shall only be effective if approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the member clubs of the League.

After its 1978 amendment, Rule 4.3 states:

> The League shall have exclusive control of the exhibition of football games by member clubs within the home territory of each member. No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the League.

Raiders in its effort to keep the team in its original home. The NFL contract action was stayed pending the outcome of this litigation, but the eminent domain action is still being prosecuted in the California courts.

Over Davis' objection that Rule 4.3 is illegal under the antitrust laws, the NFL teams voted on March 10, 1980, 22-0 against the move, with five teams abstaining. That vote did not meet the new Rule 4.3's requirement of three-quarters approval.

The Los Angeles Memorial Coliseum Commission then renewed its action against the NFL and each member club. The Oakland-Alameda County Coliseum, Inc., was permitted to intervene. The Oakland Raiders cross-claimed against the NFL and is currently aligned as a party plaintiff.

The action was first tried in 1981, but resulted in a hung jury and mistrial. A second trial was conducted, with strict constraints on trial time. The court was asked to determine if the NFL was a "single business entity" and as such incapable of combining or conspiring in restraint of trade. Referring to the reasoning in its opinion written for the first trial, 519 F.Supp. 581, 585 (1981), the court concluded the League was not a "single entity." Vol. 12 Clerk's Record # 931.

The district court denied the NFL's motions for change of venue, but did employ a detailed voir dire of the jury pool and of the jurors eventually empaneled. The trial was bifurcated so the jury could first determine liability. In the liability portion, counsel were limited to 40 hours of trial time per side in an effort to narrow the matters presented.

The trial was conducted and witnesses called, including owners of various NFL member teams and the League Commissioner, Pete Rozelle. The jury was instructed on the antitrust liability issues and sent out May 6, 1982. On May 7, 1982, the jury returned a verdict in favor of the Los Angeles Memorial Coliseum Commission and the Oakland Raiders on the antitrust claim and for the Raiders on their claim of breach of the implied promise of good faith and fair dealing. The court then continued the case to September 20, 1982, to begin the damages trial.

On June 14, 1982, the court issued its judgment on the liability issues, permanently enjoining the NFL and its member clubs from interfering with the transfer of the Oakland Raiders' NFL franchise from the Oakland Coliseum to the Los Angeles Memorial Coliseum. The court determined, in addition, that there was "no just reason for delay in entering this final judgment on plaintiff's and cross-claimant's claim for declaratory and equitable relief, and . . . expressly direct[ed] this final judgment be entered." Vol. 16 Clerk's Record # 2090. The NFL and its original clubs immediately appealed the permanent injunction (No. 82-5572); the original clubs of the American Football League also appealed (No. 82-5573), as did the Los Angeles Rams Football Co. (No. 82-5574) and the Oakland-Alameda County Coliseum (No. 82-5664). The Oakland Raiders cross-appealed challenging six orders entered by the court in 1981 and 1982 (Nos. 82-5665 and 83-5398). The NFL and Oakland Coliseum have also appealed the failure of the district court to grant their post-trial motions. (Nos. 83-5714 and 83-5732).

The damages trial was completed in May 1983 with the jury returning a verdict awarding the Raiders $11.55 million and the Los Angeles Coliseum $4.86 million. These awards were trebled by the district court pursuant to 15 U.S.C. § 15. The NFL and the other defendants have appealed. (Nos. 83-5907, 83-5908 and 83-5909). This panel will hear and decide the damage appeals. But, because these appeals were expedited, the damage appeals will be decided in a later opinion after briefing, possible argument, and submission.[2]

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[2] Once in this court, the parties have continued their practice of affirmative lawyering and have filed multiple motions. The motions that have not been resolved up until this point are here discussed.

First, the NFL has moved this court for permission to supplement the record on the question of the effect of the stipulation entered into by the parties concerning relevant market. We grant the motion and will discuss the effect of the stipulation with the merits section, *infra*.

Second, the Raiders agreed to drop its cross-appeal if the judgment of antitrust liability and injunction is affirmed. As we are affirming that

(footnote continues)

II. SHERMAN ACT § 1

The jury found that Rule 4.3 violates § 1 of the Sherman Act, 15 U.S.C. § 1. Section 1 literally prohibits every agreement, conspiracy, or other concerted activity in restraint of trade. Since Congress could not have intended that courts invalidate "every" such agreement, *see United States* v. *Joint Traffic Assn.*, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259 (1898), most restraints are analyzed under the so-called "rule of reason." *Standard Oil of New Jersey* v. *United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). The rule of reason requires the factfinder to decide whether under all the circumstances of the case the agreement imposes an unreasonable restraint on competition. *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 343, 102 S.Ct. 2466, 2472, 73 L.Ed. 48, 58 (1982).

Standard Oil, however, reconciled the earlier categorical prohibition with its own rule of reason by declaring that some restraints remain inherently unreasonable. 221 U.S. at 64-65, 31 S.Ct. at 517. When judicial experience with a particular kind of restraint enables a court to predict with certainty that the rule of reason will condemn that restraint, the court will hold that the restraint is per se unlawful. *See United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). In other cases where judges lack the expert understanding of an industry's market structure and behavior to have such certainty, the court will consider facts peculiar to the industry, the nature of the restraint and its effect to determine

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(footnote continued)

judgment, we dismiss the Raiders' cross-appeals, Nos. 82-5665 and 83-5938. It is unnecessary to address the NFL's and Oakland Coliseum's motions on this subject.

Finally, the Raiders have moved to dismiss the NFL's and Oakland Coliseum's appeals from the district court's denial of their Fed.R.Civ.P. 60(b) motions. This motion is granted. The district court lacked jurisdiction to consider this motion; its denial of the motion is not an appealable order. *Smith* v. *Lujan*, 588 F.2d 1304, 1307 (9th Cir.1979). Also, the district court indicated no desire to entertain the motions if this court remanded this case back to it. *Id.* The appeals in Nos. 83-5714 and 83-5732 are dismissed.

whether that restraint promotes or restrains competition. *See Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683, 687 (1918).

In the present case, the district judge found that the unique nature of the business of professional football made application of a per se rule inappropriate. 468 F.Supp. 154, 164-168 (1979). The court therefore instructed the jury that it was to decide whether Rule 4.3 was an unreasonable restraint of trade. The parties do not contest the appropriateness of this basic reasonableness inquiry. The NFL, however, raises two arguments against the lower court's judgment finding section 1 liability. First, the NFL contends that it is a single entity incapable of conspiring to restrain trade under section 1. Second, it insists that Rule 4.3 is not an unreasonable restraint of trade under section 1.

A. ***Single Entity***

The NFL contends the league structure is in essence a single entity, akin to a partnership or joint venture, precluding application of Sherman Act section 1 which prevents only contracts, combinations or conspiracies in restraint of trade. The Los Angeles Coliseum and Raiders reject this position and assert the League is composed of 28 separate legal entities which act independently.

The district court directed a verdict for plaintiffs on this issue and as a preliminary matter the NFL states the jury should have been allowed to decide the question. A directed verdict may be granted pursuant to Fed.R.Civ.P. 50(a) when, viewing the evidence in a light most favorable to the nonmoving party, the testimony and all the inferences that the jury could justifiably draw therefrom are insufficient to support any other finding. *Independent Iron Works, Inc.* v. *United States Steel Corp.,* 322 F.2d 656, 661 (9th Cir.), *cert. denied,* 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 165 (1963). When there is no substantial evidence to support a claim, i.e., only one conclusion can be drawn, the court must direct a verdict, even in an antitrust case. *Cleary* v. *Nat'l Distillers and Chemical Corp.,* 505 F.2d 695, 696 (9th Cir.1974). Our review is *de novo. Santa*

Clara Valley Distributing Co. v. *Pabst Brewing Co.*, 556 F.2d 942, 944 (9th Cir.1977).

It is true, as the NFL contends, that the nature of an entity and its ability to combine or conspire in violation of § 1 is a fact question. *Murray* v. *Toyota Motor Distributors, Inc.*, 664 F.2d 1377, 1379 (9th Cir.), *cert. denied*, 457 U.S. 1106, 102 S.Ct. 2905, 73 L.Ed.2d 1314 (1982). It would be reversible error, then, to take the issue from the jury if reasonable minds could differ as to its resolution. *Id.* Here, however, the material facts are undisputed. How the NFL is organized and the nature and extent of cooperation among the member clubs is a matter of record; the NFL Constitution and Bylaws contain the agreement. Based on the undisputed facts and the law on this subject, the district court correctly decided this issue.

The district court cited three reasons for rejecting the NFL's theory. Initially, the court recognized the logical extension of this argument was to make the League incapable of violating Sherman Act § 1 in every other subject restriction—yet courts have held the League violated § 1 in other areas. 519 F.Supp. at 583. Secondly, other organizations have been found to violate § 1 though their product was "just as unitary . . . and requires the same kind of cooperation from the organization's members." *Id.* Finally, the district court considered the argument to be based upon the false premise that the individual NFL "clubs are not separate business entities whose products have an independent value." 519 F.Supp. at 584. We agree with this reasoning.

NFL rules have been found to violate § 1 in other contexts. Most recently, the Second Circuit analyzed the NFL's rule preventing its member-owners from having ownership interests in other professional sports clubs. *North American Soccer League* v. *National Football League*, 670 F.2d 1249, 1257-1259 (2d Cir.), *cert. denied*, 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982). It recognized the cooperation necessary among league members, even characterizing the NFL as a joint venture, but nonetheless applied rule of reason analysis and found the cross-ownership rule violated § 1. Other courts have held the League rules governing player contracts violate § 1 of

the Sherman Act. *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C.Cir.1978); *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir.1976); *Kapp* v. *NFL*, 390 F.Supp. 73 (N.D.Cal.1974), *appeal vacated*, 536 F.2d 644 (9th Cir.1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). As noted by the Second Circuit in *Soccer League*, a finding of single entity status would immunize the NFL from § 1 scrutiny:

> To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. Moreover, the restraint might be one adopted more for the protection of individual league members from competition than to help the league.

670 F.2d at 1257.

Cases applying the single entity or joint venture theory in other business areas also contradict the NFL's argument. As stated by the Supreme Court:

> Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labelling the project a "joint venture." Perhaps every agreement and combination in restraint of trade could be so labeled.

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593, 598, 71 S.Ct. 971, 974, 95 L.Ed. 1199, 1206 (1951). *Timken* involved an allegation of territorial division among three companies that shared partial common ownership. In *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-142, 88 S.Ct. 1981, 1985-1986, 20 L.Ed.2d 982, 992 (1968), the Court reiterated that common ownership will not suffice to preclude the application of § 1. While these cases and others have been the subject of some criticism, *see, e.g.*, M.

Handler and T. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine,* 3 Cardozo Law Review 23 (1981), they remain the law. In recognition that a broad application of *Timken* and *Perma Life* could subvert legitimate procompetitive business associations, this circuit has found the threshold requirement of concerted activity missing among "multiple corporations operated as a single entity" when "corporate policies are set by one individual or by a parent corporation." *General Business Systems* v. *North American Philips Corp.,* 699 F.2d 965, 980 (9th Cir.1983); *see Thomsen* v. *Western Electric Co.,* 680 F.2d 1263, 1266 (9th Cir.), *cert. denied,* 459 U.S. 991, 103 S.Ct. 348, 74 L.Ed.2d 387 (1982); *Las Vegas Sun, Inc.* v. *Summa Corp.,* 610 F.2d 614, 617 (9th Cir.1979), *cert. denied,* 447 U.S. 906, 100 S.Ct. 2988, 64 L.Ed.2d 855 (1980). The facts make it clear the NFL does not fit within this exception. While the NFL clubs have certain common purposes, they do not operate as a single entity. NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly.

It is true the NFL clubs must cooperate to a large extent in their endeavor in producing a "product"—the NFL season culminating in the Super Bowl. The necessity that otherwise independent businesses cooperate has not, however, sufficed to preclude scrutiny under § 1 of the Sherman Act. In *Associated Press v. United States,* 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), the Supreme Court rejected the assertion that the AP was immune from section 1 because it was a necessary cooperative of independent newspapers which produced a product its individual members could not. *Id.* at 26, 65 S.Ct. at 1427, 89 L.Ed. at 2034 (Frankfurter, J., concurring). More recently, the Court found the cooperation required among ostensible competitors in arranging blanket licensing of copyrighted songs precluded only a finding of per se illegality; instead, rule of reason analysis was the proper method to determine the legality of the arrangement. *Broadcast Music, Inc.* v. *Columbia Broadcast System, Inc.,* 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1

(1979);[3] *see also Silver* v. *New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

The case of *United States* v. *Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967), is closely on point. Sealy licensed manufacturers to sell bedding products under the Sealy name and allocated territories to the licensees. The facts showed, however, that this arrangement was not vertical but horizontal; the 30 licensees, owning all of the stock of Sealy, controlled all its operations. 388 U.S. at 352-353, 87 S.Ct. at 1849-1850, 18 L.Ed.2d at 1242. Describing the Sealy organization as a joint venture, the Court nonetheless found it a per se violation of the Sherman Act. *See also United States v. Topco Associates, Inc.*, 405 U.S. 596, 609, 92 S.Ct. 1126, 1134, 31 L.Ed.2d 515, 526 (1972) (Court finding a per se violation on facts similar to *Sealy*).

The NFL structure is very similar to that in *Sealy*. The League itself is only in very limited respects an identity separate from the individual teams. It is an unincorporated, not-for-profit, "association." It has a New York office run by the Commissioner, Pete Rozelle, who makes day-to-day decisions regarding League operations. Its primary functions are in the areas of scheduling, resolving disputes among players and franchises, supervising officials, discipline and public relations. The decision involved here on territorial divisions is made by the NFL Executive Committee which is comprised of a representative of each club. Even though the individual clubs often act for the common good of the NFL, we must not lose sight of the purpose of the NFL as stated in Article I of its constitution,

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[3] On remand in *Broadcast Music* the Second Circuit did not conclude, as the NFL claims, that rule of reason analysis was unnecessary. It found only that it was unnecessary to balance the pro and anticompetitive effects of the blanket licensing arrangement because no anticompetitive effects were proven. *Columbia Broadcasting System, Inc.* v. *American Society of Composers*, 620 F.2d 930, 934-935 (2d Cir.1980), *cert. denied*, 450 U.S. 970, 101 S.Ct. 1491, 67 L.Ed.2d 621 (1981). As will be discussed below, that reasoning squares with this circuit's view that a showing of anticompetitive effect is a threshold rule of reason consideration. *See Cascade Cabinet Co.* v. *Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir.1983).

which is to "promote and foster the primary business of League members." Although the business interests of League members will often coincide with those of the NFL as an entity in itself, that commonality of interest exists in every cartel. As in *Sealy*, we must look behind the label proffered by the defendants to determine the substance of the entity in question. 388 U.S. at 353, 87 S.Ct. at 1850, 18 L.Ed.2d at 1242.

Our inquiry discloses an association of teams sufficiently independent and competitive with one another to warrant rule of reason scrutiny under § 1 of the Sherman Act. The NFL clubs are, in the words of the district court, "separate business entities whose products have an independent value." 519 F.Supp. at 584. The member clubs are all independently owned. Most are corporations, some are partnerships, and apparently a few are sole proprietorships. Although a large portion of League revenue, approximately 90%, is divided equally among the teams, profits and losses are not shared, a feature common to partnerships or other "single entities." In fact, profits vary widely despite the sharing of revenue. The disparity in profits can be attributed to independent management policies regarding coaches, players, management personnel, ticket prices, concessions, luxury box seats, as well as franchise location, all of which contribute to fan support and other income sources.

In addition to being independent business entities, the NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel. In certain areas of the country where two teams operate in close proximity, there is also competition for fan support, local television and local radio revenues, and media space.

These attributes operate to make each team an entity in large part distinct from the NFL. It is true that cooperation is necessary to produce a football game. However, as the district court concluded, this does not mean, "that each club can produce football games only as an *NFL* member." 519 F.Supp. at 584. This is especially evident in light of the emergence of the United States Football League.

For the foregoing reasons, we affirm the district court's rejection of the NFL's single entity defense.[4] Of course, the singular nature of the NFL will need to be accounted for in discussing the reasonableness of the restriction on team movement, but it is not enough to preclude § 1 scrutiny. The NFL's related argument that Rule 4.3 is valid as a restraint ancillary to a joint venture agreement will be discussed in the rule of reason analysis that follows. Contrary to the NFL's apparent belief, the ancillary restraint doctrine is not independent of the rule of reason. *National Society of Professional Engineers* v. *United States,* 435 U.S. 679 at 689, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637 at 648; *see* R. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 74 Yale L.J. 775, 796-801 (1965).

B. *Rule of Reason*

In *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683, 687 (1918), Justice

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[4] One district court case has reached the opposite conclusion in a somewhat similar context. In *San Francisco Seals, Ltd.* v. *National Hockey League,* 379 F.Supp. 966 (C.D.Cal.1974), the court upheld the NHL's right to preclude the Seals' proposed move to Vancouver. The court found both that the NHL is a single entity incapable of conspiring in violation of § 1 of the Sherman Act and that the denial of the move had no anticompetitive effect. A recent law review article argues that the court in *Seals* correctly decided the single entity issue. M. Grauer, *Recognition of the National Football League as a Single Entity under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model,* 82 Mich.L.Rev. 1 (1983). Although *Seals* and this article offer persuasive reasons for recognizing the NFL as a single entity, we do not find these reasons so compelling that existing precedent can be ignored or that we should grant this association of 28 independent businesses blanket immunity from attack under § 1 of the Sherman Act. The unitary nature of the NFL can be accounted for by analyzing the competitive harms and benefits of Rule 4.3 under the rule of reason, without impinging on Congress' authority to decide whether a specific industry deserves an exemption from the antitrust laws. *See Jefferson County Pharmaceuticals* v. *Abbott Laboratories,* _____U.S._____, _____-_____, 103 S.Ct. 1011, 1016-17, 74 L.Ed.2d 882, 890-91 (1983); *see also United States* v. *Cooper Corp.,* 312 U.S. 600, 606, 85 L.Ed. 1071, 61 S.Ct. 742 (1941).

Brandeis announced what has become the classic approach used in rule of reason analysis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

As elaborated upon by this circuit: "Rule of reason analysis calls for a 'thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition.'" *Cascade Cabinet,* 710 F.2d at 1373 (quoting *Northrop Corp* v. *McDonnell Douglas Corp.,* 705 F.2d 1030, 1050 (9th Cir.1983)). This balancing process is not applied, however, until after the plaintiff has shown the challenged conduct restrains competition. *Cascade Cabinet,* 710 F.2d at 1373. To establish a cause of action, plaintiff must prove these elements: "(1) An agreement among two or more persons or distinct business entities; (2) Which is intended to harm or unreasonably restrain competition; (3) And which actually causes injury to competition." *Kaplan* v. *Burroughs Corp.,* 611 F.2d 286, 290 (9th Cir.1979), *cert. denied,* 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980); *accord Reid Brothers Logging Co.* v. *Ketchikan Pulp Co.,* 699 F.2d 1292, 1296 (9th Cir.1983).

Our rejection of the NFL's single entity defense implicitly recognized the existence of the first element—the 28 member

clubs have entered an agreement in the form of the NFL Constitution and Bylaws. As will be developed in more detail, we have no doubt the plaintiffs also met their burden of proving the existence of the second element. Rule 4.3 is on its face an agreement to control, if not prevent, competition among the NFL teams through territorial divisions. The third element is more troublesome. It is in this context that we discuss the NFL's ancillary restraint argument. Also, a showing of injury to competition requires "[p]roof that the defendant's activities had an impact upon competition in a relevant market," *Kaplan,* 611 F.2d at 291, proof that "is an absolutely essential element of a rule of reason case." *Id.; see Aydin Corp.* v. *Loral Corp.,* 718 F.2d 897, 901 (9th Cir.1983).

Other courts have applied rule of reason analysis to determine the legality of concerted action undertaken by the NFL and for the most part have found such action illegal. *E.g., North American Soccer League,* 670 F.2d 1249; *Smith* v. *Pro Football, Inc.,* 593 F.2d 1173 (D.C.Cir.1978); *Mackey* v. *National Football League,* 543 F.2d 606 (8th Cir.1976), *cert. dismissed,* 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977). The instant case is the first of this type in this circuit, however, and the first in which a member club has questioned the legality of NFL rules.

In a quite general sense, the case presents the competing considerations of whether a group of businessmen can enforce an agreement with one of their co-contractors to the detriment of that co-contractor's right to do business where he pleases. More specifically, this lawsuit requires us to engage in the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context. Section 1 of the Sherman Act was designed to prevent agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet, as we discussed in the context of the single entity issue, the NFL teams are not true competitors, nor can they be.

The NFL's structure has both horizontal and vertical attributes. *See, e.g., Continental TV, Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). On the one

hand, it can be viewed simply as an organization of 28 competitors, an example of a simple horizontal arrangement. On the other, and to the extent the NFL can be considered an entity separate from the team owners, a vertical relationship is disclosed. In this sense the owners are distributors of the NFL product, each with its own territorial division. In this context it is clear that the owners have a legitimate interest in protecting the integrity of the League itself. Collective action in areas such as League divisions, scheduling and rules must be allowed, as should other activity that aids in producing the most marketable product attainable. Nevertheless, legitimate collective action should not be construed to allow the owners to extract excess profits. In such a situation the owners would be acting as a classic cartel. Agreements among competitors, i.e., cartels, to fix prices or divide market territories are presumed illegal under § 1 because they give competitors the ability to charge unreasonable and arbitrary prices instead of setting prices by virtue of free market forces. *See United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397, 47 S.Ct. 377, 379, 71 L.Ed. 700, 705 (1927); *United States* v. *Topco Associates*, 405 U.S. at 611, 92 S.Ct. at 1135, 31 L.Ed.2d at 527-528.

On its face, Rule 4.3 divides markets among the 28 teams, a practice presumed illegal, but, as we have noted, the unique structure of the NFL precludes application of the per se rule. *North American Soccer League*, 670 F.2d at 1258-1259; *see Cascade Cabinet Co.* v. *Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1370-1373 (9th Cir.1983). Instead, we must examine Rule 4.3 to determine whether it reasonably serves the legitimate collective concerns of the owners or instead permits them to reap excess profits at the expense of the consuming public.

1. Relevant Market

The NFL contends it is entitled to judgment because plaintiffs failed to prove an adverse impact on competition in a relevant market. The NFL's claim that it is entitled to judgment notwithstanding the verdict is governed by the same standards as a motion for directed verdict, discussed above. The court is not permitted to account for witness credibility,

weigh the evidence or reach a different result it finds more reasonable as long as, viewing the evidence in a light most favorable to the nonmoving party, the jury's verdict is supported by substantial evidence. *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1026 (9th Cir.1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 58, 74 L.Ed. 61 (1982).

The relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue. *See Kaplan*, 611 F.2d at 291; *see also Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 268-269 (7th Cir.1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982). Such evidence is essential in a section 1 case. *See Continental TV, Inc.*, 433 U.S. at 53 n. 21, 97 S.Ct. at 2559 n. 21, 53 L.Ed.2d at 582, n. 21 ("an antitrust policy divorced from market considerations would lack any objective benchmarks").

In the present case, the parties entered a stipulation regarding relevant market evidence because the time allowed for witnesses in the second trial was restricted by the trial court. The stipulation provided that no experts would be called to testify on the subject. Instead, the transcripts and exhibits used by the economic experts were deemed incorporated in the record and admitted in evidence at the retrial, allowing counsel to argue market issues as if the experts had testified before the jury. Our review shows, however, that neither the transcripts nor the exhibits were placed before the jury. We are surprised that in a trial of this magnitude these able attorneys would neglect such important evidence. Upon a careful review of the record, however, we find that testimony of others was sufficient to cover the subject where necessary, and to guide the jury's finding that Rule 4.3 is an unreasonable restraint of trade.

In the antitrust context, the relevant market has two components: the product market and the geographic market. Product market definition involves the

> process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take

> significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market.

Kaplan, 611 F.2d at 292 (quoting *SmithKline Corp.* v. *Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir.), *cert. denied*, 439 U.S. 838, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978)). Two related tests are used in arriving at the product market: first, reasonable interchangeability for the same or similar uses; and second, cross-elasticity of demand, an economic term describing the responsiveness of sales of one product to price changes in another. *Id.* at 291; see 3 J. von Kalinowski, *Antitrust Laws and Trade Regulations*, § 8.02[2] (1983). Similar considerations determine the relevant geographic market, which describes the "economically significant" area of effective competition in which the relevant products are traded. *Kaplan*, 611 F.2d at 292 (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)).

The claims of the Raiders and the L.A. Coliseum, respectively, present somewhat different market considerations. The Raiders attempted to prove the relevant market consists of NFL football (the product market) in the Southern California area (the geographic market). The NFL argues it competes with all forms of entertainment within the United States, not just Southern California. The L.A. Coliseum claims the relevant market is stadia offering their facilities to NFL teams (the product market) in the United States (the geographic market). The NFL agrees with this geographic market, but argues the product market involves cities competing for all forms of stadium entertainment, including NFL football teams.

That NFL football has limited substitutes from a consumer standpoint is seen from evidence that the Oakland Coliseum sold out for 10 consecutive years despite having some of the highest ticket prices in the League. A similar conclusion can be drawn from the extraordinary number of television viewers—over 100 million people—that watched the 1982 Super Bowl, the ultimate NFL product. NFL football's importance to the television networks is evidenced by the approximately $2

billion they agreed to pay the League for the right to televise the games from 1982-1986. This contract reflects the networks' anticipation that the high number of television viewers who had watched NFL football in the past would continue to do so in the future.

To some extent, the NFL itself narrowly defined the relevant market by emphasizing that NFL football is a unique product which can be produced only through the joint efforts of the 28 teams. Don Shula, coach of the Miami Dolphins, underscored this point when he stated that NFL football has a different set of fans than college football.

The evidence from which the jury could have found a narrow pro football product market was balanced, however, with other evidence which tended to show the NFL competes in the first instance with other professional sports, especially those with seasons that overlap with the NFL's. On a broader level, witnesses such as Pete Rozelle and Georgia Frontierre (owner of the L.A. Rams) testified that NFL football competes with other television offerings for network business, as well as other local entertainment for attendance at the games.

In terms of the relevant geographic market, witnesses testified, in particular Al Davis, that NFL teams compete with one another off the field for fan support in those areas where teams operate in close proximity such as New York City-New Jersey, Washington, D.C.-Baltimore, and formerly San Francisco-Oakland. Davis, of course, had firsthand knowledge of this when his team was located in Oakland. Also, the San Francisco Forty-Niners and the New York Giants were paid $18 million because of the potential for harm from competing with the Oakland Raiders and the New York Jets, respectively, once those teams joined the NFL as a result of the merger with the American Football League. Al Davis also testified at length regarding the potential for competition for fan support between the Raiders and the Los Angeles Rams once his team relocated in Los Angeles.

Testimony also adequately described the parameters of the stadia market. On one level, stadia do compete with one

another for the tenancy of NFL teams. Such competition is shown by the Rams' move to Anaheim. Carroll Rosenbloom was offered what he considered to be a more lucrative situation at the Big A Stadium, so he left the L.A. Coliseum. In turn, the L.A. Coliseum sought to lure existing NFL teams to Los Angeles. Competition between the L.A. Coliseum and the Oakland Coliseum for the tenancy of the Raiders resulted.

It is true, as the NFL argues, that competition among stadia for the tenancy of professional football teams is presently limited. It is limited, however, because of the operation of Rule 4.3. Prior to this lawsuit, most teams were allowed to relocate only within their home territory. That is why Carroll Rosenbloom could move his team to Anaheim. This is not to say the *potential* for competition did not previously exist. There was evidence to the effect that the NFL in the past remained expressly noncommitted on the question of team movement. This was done to give owners a bargaining edge when they were renegotiating leases with their respective stadia. The owner could threaten a move if the lease terms were not made more favorable.

The NFL claims that it is places, not particular stadia, that compete for NFL teams. This is true to a point because the NFL grants franchises to locales (generally a city and a 75 mile radius extending from its boundary). It is the individual stadia, however, which are most directly impacted by the restrictions on team movement. A stadium is a distinct economic entity and a territory is not.

It is also undoubtedly true, as the NFL contends, that stadia attempt to contract with a variety of forms of entertainment for exhibition in their facilities. In the case of the L.A. Coliseum, this includes college football, concerts, motorcycle races and the like. An NFL football team, however, is an especially desirable tenant. The L.A. Coliseum, for example, had received the highest rent from the Rams when they played there. We find that this evidence taken as a whole provided the jury with an adequate basis on which to judge the reasonableness of Rule 4.3 both as it affected competition among NFL teams and among stadia.

We conclude with one additional observation. In the context of this case in particular, we believe that market evidence, while important, should not become an end in itself. Here the exceptional nature of the industry makes precise market definition especially difficult. To a large extent the market is determined by how one defines the entity: Is the NFL a single entity or partnership which creates a product that competes with other entertainment products for the consumer (e.g., television and fans) dollar? Or is it 28 individual entities which compete with one another both on and off the field for the support of the consumers of the more narrow football product? Of course, the NFL has attributes of both examples and a variety of evidence was presented on both views. In fact, because of the exceptional structure of the League, it was not necessary for the jury to accept absolutely either the NFL's or the plaintiff's market definitions. Instead, the critical question is whether the jury could have determined that Rule 4.3 reasonably served the NFL's interest in producing and promoting its product, i.e., competing in the entertainment market, or whether Rule 4.3 harmed competition among the 28 teams to such an extent that any benefits to the League as a whole were outweighed. As we find below, there was ample evidence for the jury to reach the latter conclusion.

2. The History and Purpose of Rule 4.3

The NFL has awarded franchises exclusive territories since the 1930's. In the early days of professional football, numerous franchises failed and many changed location in the hope of achieving economic success. League members saw exclusive territories as a means to aid stability, ensuring the owner who was attempting to establish an NFL team in a particular city that another would not move into the same area, potentially ruining them both.

Rule 4.3 is the result of that concern. Prior to its amendment in 1978, it required unanimous League approval for a move into another team's home territory. That, of course, gave each owner an exclusive territory and he could vote against a move into his territory solely because he was afraid the competition might reduce his revenue. Notably, however,

the League constitution required only three-quarters approval for all other moves. The 1978 amendment removed the double-standard, and currently three-quarters approval is required for all moves.

That the purpose of Rule 4.3 was to restrain competition among the 28 teams may seem obvious and it is not surprising the NFL admitted as much at trial. It instead argues that Rule 4.3 serves a variety of legitimate League needs, including ensuring franchise stability. We must keep in mind, however, that the Supreme Court has long rejected the notion that "ruinous competition" can be a defense to a restraint of trade. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 843, 84 L.Ed. 1129, 1167 (1940). Conversely, anticompetitive purpose alone is not enough to condemn Rule 4.3. *See Chicago Board of Trade*, 246 U.S. at 238, 38 S.Ct. at 244, 62 L.Ed. at 687. The rule must actually harm competition, and that harm must be evaluated in light of the procompetitive benefits the rule might foster. *See Kaplan*, 611 F.2d at 291.

3. Ancillary Restraints and the Reasonableness of Rule 4.3

The NFL's primary argument is that it is entitled to judgment notwithstanding the verdict because under the facts and the law, Rule 4.3 is reasonable under the doctrine of ancillary restraints. The NFL's argument is inventive and perhaps it will breathe new life into this little used area of antitrust law, but we reject it for the following reasons.

The common-law ancillary restraint doctrine was, in effect, incorporated into Sherman Act section 1 analysis by Justice Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir.1898), *aff'd as modified*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899). R. Bork, *The Rule of Reason, supra* at 799-800. Most often discussed in the area of covenants not to compete, the doctrine teaches that some agreements which restrain competition may be valid if they are "subordinate and collateral to another legitimate transaction and necessary to make that transaction effective." *Id.* at 797-798; *see Addyston Pipe*, 85 F. at 281-82; *Lektro-Vend*, 660 F.2d at 265.

Generally, the effect of a finding of ancillarity is to "remove the *per se* label from restraints otherwise falling within that category." R. Bork, *Ancillary Restraints and the Sherman Act,* 15 Antitrust L.J. 211, 212 (1959). We assume, with no reason to doubt, that the agreement creating the NFL is valid and the territorial divisions therein are ancillary to its main purpose of producing NFL football. The ancillary restraint must then be tested under the rule of reason, *id.*, the relevance of ancillarity being it "increases the probability that the restraint will be found reasonable." *Aydin Corp.* v. *Loral Corp.*, 718 F.2d 897, 901 (9th Cir.1983). As we have already noted, the rule of reason inquiry requires us to consider the harms and benefits to competition caused by the restraint and whether the putative benefits can be achieved by less restrictive means.

The competitive harms of Rule 4.3 are plain. Exclusive territories insulate each team from competition within the NFL market, in essence allowing them to set monopoly prices to the detriment of the consuming public. The rule also effectively foreclosed free competition among stadia such as the Los Angeles Coliseum that wish to secure NFL tenants. *See Smith* v. *Pro Football, Inc.*, 593 F.2d at 1185. The harm from Rule 4.3 is especially acute in this case because it prevents a move by a team into another existing team's market. If the transfer is upheld, direct competition between the Rams and Raiders would presumably ensue to the benefit of all who consume the NFL product in the Los Angeles area.

The NFL argues, however, that territorial allocations are *inherent* in an agreement among joint venturers to produce a product. This inherent nature, the NFL asserts, flows from the need to protect each joint venturer in the "legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." *Addyston Pipe & Steel,* 85 F. at 282. We agree that the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture and to secure each venturer the legitimate fruits of that participation.

Rule 4.3 aids the League, the NFL claims, in determining its overall geographical scope, regional balance and coverage of

major and minor markets. Exclusive territories aid new franchises in achieving financial stability, which protects the large initial investment an owner must make to start up a football team. Stability arguably helps ensure no one team has an undue advantage on the field. Territories foster fan loyalty which in turn promotes traditional rivalries between teams, each contributing to attendance at games and television viewing.

Joint marketing decisions are surely legitimate because of the importance of television. Title 15, U.S.C. § 1291 grants the NFL an exemption from antitrust liability, if any, that might arise out of its collective negotiation of television rights with the networks. To effectuate this right, the League must be allowed to have some control over the placement of teams to ensure NFL football is popular in a diverse group of markets.

Last, there is some legitimacy to the NFL's argument that it has an interest in preventing transfers from areas before local governments, which have made a substantial investment in stadia and other facilities, can recover their expenditures. In such a situation, local confidence in the NFL is eroded, possibly resulting in a decline in interest. All these factors considered, we nevertheless are not persuaded the jury should have concluded that Rule 4.3 is a reasonable restraint of trade. The same goals can be achieved in a variety of ways which are less harmful to competition.

As noted by Justice Rehnquist, a factor in determining the reasonableness of an ancillary restraint is the "possibility of less restrictive alternatives" which could serve the same purpose. *See* Justice Rehnquist's dissent from the denial of certiorari in *North American Soccer League,* 459 U.S. 1074, 1080, 103 S.Ct. 499, 502, 74 L.Ed.2d 639, 641 (1982); *Lektro-Vend,* 660 F.2d at 265. This is a pertinent factor in all rule of reason cases. *See Betaseed, Inc.* v. *U & I Inc.,* 681 F.2d 1203, 1228-30 (9th Cir.1982); *Berkey Photo, Inc.* v. *Eastman Kodak Co.,* 603 F.2d 263, 303 (2d Cir.1979), *cert. denied,* 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). Here, the district court correctly instructed the jury to take into account the existence of less restrictive alternatives when determining the reasonableness of

Rule 4.3's territorial restraint. 32 T.R.2d at 7218; *see Betaseed, Inc.*, 681 F.2d 1203 at 1228; *Berkey Photo*, 603 F.2d at 303. Because there was substantial evidence going to the existence of such alternatives, we find that the jury could have reasonably concluded that the NFL should have designed its "ancillary restraint" in a manner that served its needs but did not so foreclose competition.

The NFL argues that the requirement of Rule 4.3 that three-quarters of the owners approve a franchise move is reasonable because it deters unwise team transfers. While the rule does indeed protect an owner's investment in a football franchise, no standards or durational limits are incorporated into the voting requirement to make sure that concern is satisfied. Nor are factors such as fan loyalty and team rivalries necessarily considered.

The NFL claims that its marketing and other objectives are indirectly accounted for in the voting process because the team owners vote to maximize their profits. Since the owners are guided by the desire to increase profits, they will necessarily make reasonable decisions, the NFL asserts, on such issues of whether the new location can support two teams, whether marketing needs will be adversely affected, etc. Under the present Rule 4.3, however, an owner need muster only seven friendly votes to prevent three-quarters approval for the sole reason of preventing another team from entering its market, regardless of whether the market could sustain two franchises. A basic premise of the Sherman Act is that regulation of private profit is best left to the marketplace rather than private agreement. *See United States* v. *Trenton Potteries*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). The present case is in fact a good example of how the market itself will deter unwise moves, since a team will not lightly give up an established base of support to confront another team in its home market.

The NFL's professed interest in ensuring that cities and other local governments secure a return on their investment in stadia is undercut in two ways. First, the local governments

ought to be able to protect their investment through the leases they negotiate with the teams for the use of their stadia. Second, the NFL's interest on this point may not be as important as it would have us believe because the League has in the past allowed teams to threaten a transfer to another location in order to give the team leverage in lease negotiations.

Finally, the NFL made no showing that the transfer of the Raiders to Los Angeles would have any harmful effect on the League. Los Angeles is a market large enough for the successful operation of two teams, there would be no scheduling difficulties, facilities at the L.A. Coliseum are more than adequate, and no loss of future television revenue was foreseen. Also, the NFL offered no evidence that its interest in maintaining regional balance would be adversely affected by a move of a northern California team to southern California.

It is true, as the NFL claims, that the antitrust laws are primarily concerned with the promotion of *interbrand* competition. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51, 97 S.Ct. 2549, 2558, 53 L.Ed.2d 568, 581, n. 19 (1977). To the extent the NFL is a product which competes with other forms of entertainment, including other sports, its rules governing territorial division can be said to promote interbrand competition. Under this analysis, the territorial allocations most directly suppress intrabrand, that is, NFL team versus NFL team, competition. A more direct impact on intrabrand competition does not mean, however, the restraint is reasonable. The finder of fact must still balance the gain to interbrand competition against the loss of intrabrand competition. *See id.*, at 51-56, 97 S.Ct. at 2558-2560. Here, the jury could have found that the rules restricting team movement do not sufficiently promote interbrand competition to justify the negative impact on intrabrand competition.

To withstand antitrust scrutiny, restrictions on team movement should be more closely tailored to serve the needs inherent in producing the NFL "product" and competing with other forms of entertainment. An express recognition and consideration of those objective factors espoused by the NFL as important, such as population, economic projections, facilities,

regional balance, etc., would be well advised. *See* L. Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws,* 15 Conn. L.R. 183, 206 (1983). Fan loyalty and location continuity could also be considered. *Id.* at 206-207. Al Davis in fact testified that in 1978 he proposed that the League adopt a set of objective guidelines to govern team relocation rather than continuing to utilize a subjective voting procedure.

Some sort of procedural mechanism to ensure consideration of all the above factors may also be necessary, including an opportunity for the team proposing the move to present its case. *Id.; see Silver* v. *New York Stock Exchange* 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963) (without procedural safeguards, the collective act of the Exchange in disconnecting the wire service to a broker constituted a boycott, per se illegal under § 1); *cf. Deesen* v. *Professional Golfers Ass'n,* 358 F.2d 165 (9th Cir.), *cert. denied,* 385 U.S. 846, 87 S.Ct. 72, 17 L.Ed.2d 76 (1966) (where PGA had reasonable rules governing eligiblity of players for tournaments, there was not a § 1 violation). In the present case, for example, testimony indicated that some owners, as well as Commissioner Rozelle, dislike Al Davis and consider him a maverick. Their vote against the Raiders' move could have been motivated by animosity rather than business judgment.

Substantial evidence existed for the jury to find the restraint imposed by Rule 4.3 was not reasonably necessary to the production and sale of the NFL product. Therefore, the NFL is not entitled to judgment notwithstanding the verdict.

III. JURY INSTRUCTIONS

The NFL also claims it is entitled to a new trial because of error in the jury instructions. In particular, the NFL argues that the instructions lacked the specificity required in a complex lawsuit such as this, that certain of its legal theories should have been presented to the jury, and that the instructions failed to articulate all the requirements of the law for finding an unlawful restraint of trade. The L.A. Coliseum and the Raiders

respond by stating that the instructions as given were entirely adequate and the NFL simply attempted to have the jury charged with a partisan and erroneous view of the law.

As required by Fed.R.Civ.P. 51, the NFL submitted proposed instructions and made timely objections when certain of its proposals were rejected. The question, then, is whether, viewing the jury instructions as a whole, the trial judge gave adequate instructions on each element of the case to insure that the jury fully understood the issues. *Ragsdell* v. *Southern Pacific Transportation Co.*, 688 F.2d 1281, 1282 (9th Cir.1982); *Van Cleef* v. *Aeroflex Corp.*, 657 F.2d 1094, 1099 (9th Cir.1981). A court is not required to use the exact words proposed by a party, incorporate every proposition of law suggested by counsel or amplify an instruction if the instructions as given allowed the jury to determine intelligently the issues presented. *Id; Investment Service Co.* v. *Allied Equities Corp.*, 519 F.2d 508, 511 (9th Cir.1975). Well-tailored and specific instructions may be necessary, however, in complex antitrust cases "where . . . abstract legal principles are not self-explanatory to a lay jury, and the facts to which they must be applied are complex." *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 466 n. 13 (9th Cir.), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964). Also, a party is entitled to have theories supported by the evidence presented to the jury. *Reno-West Coast Distribution Co., Inc.* v. *Mead Corp.*, 613 F.2d 722, 725-726 (9th Cir.), *cert. denied*, 444 U.S. 927, 100 S.Ct. 267, 62 L.Ed.2d 183 (1979). The theory, of course, must have legal as well as factual support; if what is proposed is incorrect the court is not required to recast it in order to ensure the party's exact theory is before the jury, so long as the instructions describe the applicable law. *See id.*

The NFL first contends the instructions failed to emphasize the unique nature of the business of producing NFL football, a business, it argues, most aptly characterized as a joint venture. The trial court's rule of reason instruction, however, told the jury it should consider the "nature of" and "facts peculiar to" the industry and that "one factor you may consider is the degree of mutual cooperation inherent among the member

clubs of a professional sports league and the extent to which professional sports leagues differ from ordinary kinds of businesses." 32 T.R.2d at 7216-7218. While not framed in the terms and detail requested by the NFL, this instruction did apprise the jury of the unique nature of NFL football. The trial court was not obliged to specifically instruct the jury on the NFL's theory that the restraint involved here is ancillary to a valid joint venture agreement. The Supreme Court has recognized that the "Rule of Reason . . . has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction." *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 689, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637, 648 (1978). The NFL's theory is subsumed within the rule of reason. As the district court emphasized, the NFL had every opportunity to present its view of the legality of Rule 4.3 to the jury. 32 T.R.2d at 7195, 7223. The NFL did just that in its closing argument. E.g., 33 T.R.2d at 7491-7495.

The NFL next argues the district court improperly rejected its instruction on causation. It is true the court did not instruct the jury on this element of proving when an injured party is entitled to treble damages under § 4 of the Clayton Act. *See Brunswick* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701, 712 (1977); *see also Kapp* v. *National Football League,* 586 F.2d 644, 648 (9th Cir.1978), *cert. denied,* 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). In this bifurcated trial, however, the jury and the court were not faced with the question of the propriety of an award of damages, but with the question whether Rule 4.3 violated the antitrust laws and therefore could not be used to preclude the Raiders' move south. *Pueblo Bowl-O-Mat,* 429 U.S. at 491, 97 S.Ct. at 698, 50 L.Ed.2d at 713. Whether the jury received proper instructions in this area is best left for the appeal of the damage portion of the trial.

The NFL also argues it was unduly prejudiced by the instructions because they focused on issues of competition among the NFL teams (intrabrand competition) rather than competition between the NFL "product" and other forms of

entertainment (interbrand competition). As the NFL asserts, it is the suppression of interbrand competition that primarily concerns the antitrust laws. The trial court instructed the jury on the NFL's relevant market claim that it competes with all forms of entertainment. 32 T.R.2d at 7212-7215. In light of this instruction, the jury was not constrained to ascertain the reasonableness of Rule 4.3 solely in view of the internal NFL market.

There also was no error in the failure of the district court to charge the jury that it could balance the loss of competition in the San Francisco Bay Area against that to be gained in the Los Angeles area. The extent of the loss and gain to competition in these locations was a fact question that could be argued to the jury.

The NFL next argues that the trial court should have charged the jury that it could consider the procompetitive significance of public service and similar benefits, if any, that inure to Rule 4.3. We again find no error. As stated in *National Society of Professional Engineers:*

> the purpose of [either per se or rule of reason] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of the industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

435 U.S. at 692, 98 S.Ct. at 1365, 55 L.Ed.2d at 650. The judge instructed the jury that it should consider only procompetitive benefits of Rule 4.3. 32 T.R.2d at 7216. The NFL was permitted to argue that Rule 4.3 has procompetitive effects related to serving the public. No more is necessary.

The NFL's other assignments of error in the instructions are without merit. In sum, we are not persuaded that any lack of specificity misled the jury.

IV. VENUE

Oakland Coliseum, intervenor joined by the NFL, argues that the trial court abused its discretion by denying a change of venue motion made pursuant to 28 U.S.C. § 1404(a). In relevant portion, § 1404(a) allows a district court to change venue "in the interest of justice." Oakland Coliseum claims justice would have best been served by moving the case because it was impossible to secure an impartial jury in the Central District of California due to pretrial publicity and the economic interest of the prospective jurors in the outcome of the lawsuit. Prior to voir dire, the district court made a thoughtful and thorough analysis of Oakland's contentions in its memorandum and order denying the change of venue motion. 89 F.R.D. 497 (1981).

We will find an abuse of discretion warranting reversal only if Oakland Coliseum shows "that the setting of the trial was inherently prejudicial or that the jury selection process permits an inference of actual prejudice." *Murphy* v. *Florida,* 421 U.S. 794, 803, 95 S.Ct. 2031, 2037, 44 L.Ed.2d 589, 597 (1975); *see Smith* v. *Phillips,* 455 U.S. 209, 215-217, 102 S.Ct. 940, 944-945, 71 L.Ed.2d 78, 85-86 (1982); *Chandler* v. *Florida,* 449 U.S. 560, 581-582, 101 S.Ct. 802, 813, 66 L.Ed.2d 740, 756 (1981); *United States* v. *Bailleaux,* 685 F.2d 1105, 1109 (9th Cir.1982); *United States* v. *Brown,* 540 F.2d 364, 379 (8th Cir.1976). Neither the pretrial publicity nor the alleged financial interest of the jurors compels such a finding.

We assume, with some basis, that the Raiders' proposed move and this lawsuit generated a large amount of publicity in the Los Angeles area. That in itself, however, is insufficient to compel a finding that the defendants were denied an impartial jury. *Dobbert* v. *Florida,* 432 U.S. 282, 302-303, 97 S.Ct. 2290, 3202-3203, 53 L.Ed.2d 344, 361-362 (1977); *Murphy* v. *Florida,* 421 U.S. at 800-802, 95 S.Ct. at 2036-2037, 44 L.Ed.2d at 595-596. Only in those situations which are "utterly corrupted by press coverage" will we indulge in a presumption of actual prejudice on the part of any or all of the jurors. *Murphy,* 421 U.S. at 798, 95 S.Ct. at 2035, 44 L.Ed.2d at 594. No such

showing has been made out here. The trial court used a very thorough voir dire process to ensure the jury panel members were not influenced by the publicity prior to trial, including administering a 48-page questionnaire prepared by the NFL to all prospective jurors, giving each side ten peremptory challenges instead of the normal three, and dismissing jurors for cause if even the slightest doubt of prejudice was raised. During the trial, the court admonished the jurors each day to refrain from exposure to any type of media coverage of the trial. In fact, one juror was excused because he admitted reading an unscreened newspaper, even though he adamantly denied reading anything but the Ann Landers column, the comics and the "Family Weekly" section. 23 T.R.2d at 4705-4706, 4920. In view of the trial court's thorough cautionary actions, we cannot say either that he abused his discretion in denying a change of venue or that defendants received an unfair trial because of the publicity.

Failing to show anything beyond the slightest speculation that publicity infected the fairness of the trial, Oakland Coliseum turns to the argument that the jurors had a financial interest in the outcome of the lawsuit which biased their decision. This contention is premised on the economic interest through lower taxes and business generation that residents of the Central District of California purportedly would have in the Raiders' presence in the L.A. Coliseum. The argument also seeks support in Supreme Court precedent such as *Withrow* v. *Larkin,* 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), and *Tumey* v. *Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), which stand for the proposition "that the probability of actual bias on the part of the judge or decisionmaker is too high . . . [when] the adjudicator has a pecuniary interest in the outcome." *Withrow,* 421 U.S. at 47, 95 S.Ct. at 1464, 43 L.Ed.2d at 728. Those cases do not mean, however, that an immeasurable and seemingly insignificant economic benefit to a taxpayer suffices to disqualify her or him as a juror. *Virginia Electric & Power Co.* v. *Sun Shipbuilding & Dry Dock Co.,* 389 F.Supp. 568, 571 (E.D.Va.1975); *cf. United States* v. *Brown* 540 F.2d 364, 379 (8th Cir.1976) (there was no basis to strike

jurors for cause merely on showing they resided in St. Louis and indictment alleged a scheme to defraud the city and its citizens).

Here, in fact, four of the eight jurors resided outside Los Angeles County. All the jurors were questioned during voir dire on their potential for any financially motivated bias and the judge was satisfied with the jurors' responses to his questions. Apparently recognizing the defects in its arguments, Oakland also alleges that the questioning and arguments of plaintiffs' counsel at trial were sufficient to convince the jurors to lay aside their sworn duties and decide the case on the basis of "hometown" interests. We decline to engage in such speculation about the mental processes of the individual jurors.

The other arguments made by Oakland on this issue, such as the one claiming it was denied a representative jury because the jury had no football fans, lack merit. Parties are not entitled to jurors of a particular bent or persuasion. They are entitled only to jurors as fair and impartial as all human circumstances and an evenhanded selection process permits. Nor do we believe the "cumulative" effect of the publicity, economic interests and the like show a sufficient likelihood of actual bias. Without more, we are compelled to affirm the denial of the change of venue motion and conclude that the defendants received a fair trial by an impartial jury.

V. CONCLUSION

The NFL is an unique business organization to which it is difficult to apply antitrust rules which were developed in the context of arrangements between actual competitors. This does not mean that the trial court and jury were incapable of meeting the task, however. The lower court correctly applied and described the law. The reasonableness of a restraint is a "paradigm fact question," *Betaseed, Inc.* v. *U and I Inc.*, 681 F.2d 1203, 1228 (9th Cir.1982), and our review of the record convinces us the jury had adequate evidence to answer that question.

We believe antitrust principles are sufficiently flexible to account for the NFL's structure. To the extent the NFL finds the law inadequate, it must look to Congress for relief.

The judgment finding the NFL liable to the Los Angeles Coliseum and the Raiders, and enjoining the NFL from preventing the Raiders from relocating in Los Angeles is

AFFIRMED.

SPENCER WILLIAMS, District Judge, Sitting by Designation, concurring in part, dissenting in part.

INTRODUCTION:

I respectfully dissent from the majority's opinion, insofar as it affirms the district judge's directed verdict that the N.F.L. was not a single entity as a matter of law.

The dispositive issue before this Court is whether the N.F.L.'s invocation of Rule 4.3 to block the Raiders' move to Los Angeles violates the letter and spirit of § 1 of the Sherman Act, 15 U.S.C. § 1. I conclude that the N.F.L. is, as a matter of law, a single entity insofar as this aspect of its operations is concerned, and not subject to the strictures of Sherman Act § 1.

These appeals arise from the controversial relocation of the Raiders National Football League franchise ("Raiders") from Oakland, California to Los Angeles, California. Although many subsidiary procedural issues are posed on appeal, the case stands or falls on whether the trial judge properly concluded that the N.F.L. was not a "single entity", thereby exposing it to liability for Rule 4.3 under the Sherman Act, § 1.

FACTS:

Our consideration of the issue whether or not Rule 4.3 of Article IV of the N.F.L. Constitution violates federal antitrust laws must turn on the relationship of Rule 4.3 to the structure of the league. For this reason, it is appropriate to briefly examine the history and nature of the N.F.L. as a business association, before addressing the issues raised on this appeal.

A. *The Relevant History of the N.F.L.*

The N.F.L. was established early in this century as an unincorporated business association, the members of which were member franchise clubs dispersed throughout the United States. All but one of its members are privately owned and operated, and although members of the N.F.L. compete on the playing field, they act jointly in many aspects of their enterprise, as the term "league" implies.

The N.F.L.'s Constitution and By-Laws wield almost plenary control over member clubs' activities; the N.F.L. acts as the legislative entity which sets rules for, and schedules contests between member clubs, and regulates many other aspects of the operation of the professional football industry, (*e.g.*, an annual draft of eligible college athletes), including the territorial restriction on franchise relocation found in Rule 4.3.

Of particular importance to our analysis is the fact that the N.F.L. Constitution provides for coordination of business activities and revenue sharing to an overwhelming degree. For example, the money derived from lucrative national broadcasting contracts is shared among league members according to agreed upon formulae, and this revenue makes up a large part of the revenue of each team. As to gate receipts for regularly scheduled contests between member clubs, there is a prearranged equation splitting gate admissions between the "home" and "visiting" clubs. Thus, each team relies, to a significant degree, on revenue jointly generated.[1] It is not surprising that, concomitant with this virtual "partnership" arrangement, of which the above-mentioned revenue sharing is most significant, other operating decisions which would normally be made by the owners of a single franchise are subordinated to specified consent of the other clubs. For example, establishment of a new franchise is submitted for approval to all N.F.L. owners before any expansion is permitted. Agreements among owners regarding who shall have

[1] Indeed, no team could generate any revenue without drawing down upon the goodwill and reputation of the N.F.L. in the largest sense, or upon the status of any one scheduled opponent in an immediate sense, so that, in effect, all team revenue is jointly produced.

the right to employ certain athletes occur every year at an annual "draft" of available players.

At issue here is one aspect of the relationship among the member clubs of the N.F.L. as to when a member franchise club may be relocated to a city other than its original home. It is quite relevant to disposition of this instant suit that those challenging the legality of Rule 4.3 are the Raiders, presently a member club, and the L.A. Coliseum, a stadium seeking an N.F.L. tenant.

B. *The History of the Present Action.*

I agree in large part with the majority's review of the facts leading up to the two trials below. However, I would emphasize the troubling effect that the stipulation on the presentation of evidence in the second trial had upon the sufficiency of the evidence on relevant markets that was actually placed before the jury.[2]

C. *The Various Appeals Pending before this Court.*

In addition to the appeal to which the majority and I turn our primary attention, several other motions are pending before this Court. It is these items, and the questions that these cross-appeals raise, that I now address.

Once in this Court, the parties have continued to file multiple, and somewhat conflicting, appeals. The motions that have not been resolved by the majority are largely different procedural means to accomplish the same ends; I discuss the more significant below.

First, the N.F.L. has moved this Court for permission to supplement the record on the question of the effect of the stipulation entered into by the parties concerning the evidence introduced at the second trial on the relevant market. I find the majority's treatment of this matter interesting, inasmuch as it suggests that the issue of relevant market is no longer one for the jury; we admit to similar surprise that the very evidence that

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[2] See Majority Opinion at 1392-1394, and my discussion *infra* of the inconsistency left unanswered by the majority's treatment.

the parties thought at a minimum should have been placed before the jury was, in fact, never so placed in the second trial. Regardless of how the majority wishes to restate the manner in which relevant market is to be proven in this Circuit, its approach is to recharacterize the case as was tried, and suggest by inference that the plaintiff may discharge its burden of establishing the relevant product and geographic markets by a theoretical argument to the court, rather than by presenting evidence to a jury; this lynchpin of its "rule of reasonableness" cannot pass as innocuously by long-standing precedent as the majority would have it. Since I feel that it was error to submit Rule 4.3 to the jury in this context, I would not so strain the case as was tried the second time around to conform it to some new, and as yet undefined, rule of law.

Second, the Raiders cross-appeal from the district judge's rulings: (1) determining, on summary judgment, that N.F.L. Rule 4.3 was effectively amended on October 5, 1978; (2) that, as a matter of law, no contract was created between the Raiders and the N.F.L., on October 5, 1978; and, (3) that a directed verdict on behalf of Rozelle, Frontiere and Klein was appropriate, would presumably be withdrawn, under the majority's disposition; I would affirm the trial court's handling of all three matters.

Finally, as for the N.F.L.'s motion for remand of the injunctive judgment entered on June 14, 1982, with instructions to the court for a new trial, I find the matters raised by the motion in the alternative to the N.F.L.'s notice of appeal, especially the allegations surrounding the plaintiffs' suppression of a key document, the "Hardy notes," distressing. I note that the majority's opinion does not deal with this issue.

DISCUSSION:

The district court found there were no disputed issues of material fact on the question of whether the N.F.L. was a single entity under the Sherman Act § 1, insofar as its enforcement of Rule 4.3 was concerned, and directed a verdict for appellees concluding that it was not. Upon this finding, Rule 4.3 was

submitted to the jury's scrutiny under the Rule of Reason analysis of the Sherman Act, § 1.

Under established Ninth Circuit law, resolution of whether the N.F.L. had the capacity to violate Section 1 of the Sherman Act by conspiring *inter se* must be committed to the jury, if there exists "sufficient evidence in the record to permit a jury to find" that the N.F.L. was not a single entity, but "not . . . sufficient (evidence) to preclude the jury from finding otherwise." *Murray* v. *Toyota Motor Distributors, Inc.*, 664 F.2d 1377, 1379 (9th Cir.1982) (*per curiam*).

In *Murray* v. *Toyota Motor Distributors, Inc., supra,* the Ninth Circuit held that the "single entity" question must not be taken from the jury where the evidence would *permit* a finding that the defendants are part of a single economic unit. As the majority in this case states: "(i)t would be reversible error, then, to take the issue from the jury if reasonable minds could differ as to its resolution". *Id.* I read the majority's opinion to find such an opportunity for "reasonable minds" to differ, even if the evidence that whether "the N.F.L. has attributes of a partnership or joint venture (wa)s *not* "compelling", since it should have been submitted to the jury once there was simple "persuasive" evidence on either side. *C.f., Majority Opinion* at 1387.

I agree however with the district court that there were no material issues of disputed fact as to whether the N.F.L. was a single entity, and that the matter was ripe for disposition as a matter of law by the court. I also apply the settled rule of appellate review, that such decisions by the trial court are subject to *de novo* review by this Court. *C.f., General Business Systems* v. *North American Phillips Corp.*, 699 F.2d 965, 980-81 (9th Cir.1983). But, the majority and I differ substantially in the conclusions to be drawn from such undisputed evidence.

The only realistic manner in which to define what constitutes a single entity for antitrust review is to focus upon the purpose the definition is to serve. "Single entity" taken in a functional sense begins and ends with an analysis of formal

organizational and operational aspects of an enterprise, reconciled with the realities of the economic competition in the marketplace. If the aim of the Sherman Act § 1 is consumer-dictated supply, unfettered by conspiracy between competing producers,—and, I submit that it is—extreme caution is warranted in defining precisely what competitive units exist in the marketplace. It is equally as important to permit collaboration and concerted action among branches of a single economic entity in the marketplace with impunity from the Sherman Act § 1, as it is to police conspiracies between economic competitive entities. Nonetheless, all economic units remain susceptible to challenge under the antitrust laws from those external entities injured by acts violative of § 1, or competitive entities injured as a result of monopoly, or attempted monopoly, in an industry under Sherman Act § 2 tenets.

Resolving whether the N.F.L. is a single entity requires consideration of many factors, including formalistic aspects of operations such as ownership, overlapping directorates, joint marketing or manufacturing, legal identity, corporate law autonomy, and substantive aspects such as *de facto* autonomy of member clubs, chains of command over policy decisions, public perception and economic interdependency rendering otherwise independent member clubs subordinate to the integrated whole. When the entities in question are to be evaluated under the antitrust laws, the crucial criterion is whether the formally distinct member clubs compete in any economically meaningful sense in the marketplace. See *General Business Systems, supra* at 980-81.

The majority's attempt to reconcile its decision with that of *General Business Systems, supra,* is misleading and inaccurate. The text of the majority's opinion implies that corporate policies *must* be unitary for a business organization to be found a single entity. In *General Business Systems, supra,* at 980-81, the Circuit concluded that in any case in which the relationship between the two or more formal entities did "not fall clearly at either of these extremes"; *i.e.,* "where corporate policies are set by one individual or a parent corporation" or where "jointly owned corporations that compete in the marketplace, hold

themselves out to the public as competing organizations, and set policy independently . . ." (*id.* at 980), the case must be sent to the jury. This admonition was disregarded in this case—a paradigm case testing the functional "single entity" concept.

The district court placed an unwarranted emphasis upon the formalistic aspects of the relationship of the N.F.L. and the member clubs, ignoring the subtle, but yet more significant interdependency of the member clubs and the indivisibility of the clubs with the N.F.L. 519 F.Supp. 581, 582-83. For example, the district court makes much of two such formal organizational characteristics: separate incorporation and management. *Id.* But, when viewed from the mundane perspective of daily operations, emphasis upon these legal formalisms obscures the reality of life in the N.F.L. Only the athletic strategems are autonomous—albeit tightly constrained by league guidelines on eligibility, medical and physical condition and exploitation of player talent. The N.F.L. cannot truly be separated from its member clubs, which are simultaneously franchisees and franchisors. The Raiders did not, and do not now, seek to compete with the other clubs in any sense other than in their win/loss standings; they do not challenge the plethora of other ancillary regulations attendant to the league structure, including the draft, regulation and scheduling of meetings between teams, and the system of pooled and shared revenues among the clubs because they wish to remain within its beneficial ambit.

As the majority opinion correctly points out:

> this lawsuit requires us to engage in the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context. Section 1 of the Sherman Act was designed to prevent agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet, . . . , the N.F.L. teams *are not true competitors nor can they be.*

Majority opinion, at 1391, *emphasis added.* Yet, the majority's analysis falters in a similar manner. It is the commonality of, or necessary cooperation in, the means of production, not the formal structure of the ownership of the N.F.L. infrastructure which should be determinative of the classification of this enterprise.

The profound interdependency of the N.F.L. and member clubs in the daily operation and strategic marketing of professional football belies the district court's conclusion that each member club is an individual and economically meaningful competitor. The dispositive factor in determining whether the member clubs are capable of conspiring to restrain competition—the *sine qua non* of the Sherman Act § 1—by reason of Rule 4.3, is the extent, if any, of their competition in an economic sense. Virtually every court to consider this question has concluded that N.F.L. member clubs do *not* compete with each other in the economic sense. See *North American Soccer League* v. *N.F.L.,* 670 F.2d 1249, 1251 (2d Cir.1982); *Smith* v. *Pro Football, Inc.,* 593 F.2d 1173, 1179 (D.C.Cir.1978); *Mackey* v. *N.F.L.,* 543 F.2d 606, 619 (8th Cir.1976); *Mid-South Grizzlies* v. *N.F.L.,* 550 F.Supp. 558, 562 (E.D.Pa.1982); *U.S.* v. *N.F.L.,* 116 F.Supp. 319, 323-324 (E.D.Pa.1953).

As the district court in *Mid-South Grizzlies* acknowledged, although

> (a)ll but one team are privately owned and operated . . . and 'compete' with one another on the playing field and for the top players, they act jointly in many aspects of their enterprise as the term league necessarily implies.

Mid-South Grizzlies, supra at 562. In adopting this view to reject a potential entrant's challenge to his exclusion from N.F.L. participation, the court in *Mid-South Grizzlies* recognized that the creation of many joint products, only the most tangible of which is the professional football season, as byproducts of the intangible "goodwill" are directly attributable to the present league/member club structure. *Id.* at 568. I agree with the other courts which, when presented with similar questions

arising in professional hockey and basketball, realized that it is nonsensical to emphasize intrinsic worth of a franchise in a vacuum, when the value of the franchises are part and parcel of the quality and conformity insured by league regulation of the placement, ownership, and coordination of all on and off the field interaction of member clubs. See *San Francisco Seals, Ltd.* v. *National Hockey League,* 379 F.Supp. 966, 969-971 (C.D.Cal.1974) (the N.H.L., although subject to full scope of the antitrust laws, is "one single business enterprise, competing against other similarly organized professional leagues"); *Levin* v. *National Basketball Association,* 385 F.Supp. 149, 150, 152 (S.D.N.Y.1974) ("While it is true that the antitrust laws apply to a professional athletic league, and that joint action by members of a league can have antitrust implications this is not such a case.").

The majority's holding places the Ninth Circuit's ruling in conflict with every other circuit to consider this issue. As the majority points out, but misapplies, the Second Circuit found the N.F.L. to be an "unincorporated joint venture". *N.A.S.L.* v. *N.F.L., supra* at 1257, (2d Cir.), *cert. denied,* ____U.S.____, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982). The Fifth Circuit, in an obscure but quite scholarly opinion, analyzed the North American Soccer League to be like the N.F.L.; *i.e.,* a "joint employer" for labor relations purposes, upon an examination of its "N.F.L.-like" characteristics. *N.A.S.L.* v. *N.L.R.B.,* 613 F.2d 1379, 1382 (5th Cir.1980). The Third Circuit, after reviewing the substantial history of "single entity" litigation in the professional sports leagues, endorsed the D.C. Circuit's conclusion that the N.F.L. was a "single entity" for purposes of Sherman Act § 1, and thus not subject to "invocation of a *per se* rule" against "group boycotts", because: (1) "the N.F.L. clubs that had combined were *not* competitors in any *economic* sense" and "no team was 'interested in driving another team out of business'; and, (2) the N.F.L. clubs had not combined '*to exclude competitors or potential competitors* from their level of the market.' *Larry V. Muko, Inc.* v. *Southwestern P.A., etc.,* 670 F.2d 421, 429, n. 11 (3d Cir.1982), citing *Smith* v. *Pro Football, Inc.,* 593 F.2d 1173, 1178 (D.C.Cir.1978). (*emphasis in original*). (Other citations omitted).

What these courts have all recognized, and what ultimately persuades me, is that functionally distinct units that cannot produce separate, individual goods or services absent coordination are inextricably bound in an economic sense, and must adopt certain intra-league instrumentalities to regulate the whole's "downstream output". In the case of the member clubs, this "downstream output" is professional football, and the organ of regulation is the unincorporated, not-for-profit, association commonly known as the N.F.L. There is virtually no practical distinction between the League, administered by the appointed Commissioner, *per se* and the member clubs; the N.F.L. represents to all clubs, including the Raiders, the least-costly and most efficient manner of reaching day-to-day decisions regarding the production of their main, and collectively produced product.

Although the N.F.L. determines matters of scheduling, resolving player disciplinary matters and inter-club disputes, supervising officials and public relations, as well as other routine matters, critical league decisions, such as the matter of franchise location, are submitted to an Executive Committee comprised of a representative of each club. There can be no instance of the Executive Committee acting in other than the collective interests of the member clubs, since by definition, that body's decisions are the consensus of N.F.L. members. There is no distinct interest of the N.F.L., since it exists solely to coordinate the members' participation in the joint production of professional football.

By riveting its attention upon the "single entity" issue, as a sort of talismanic affirmative defense to the appellees' charges here, the district court overlooked the dispositive inquiry of whether Rule 4.3, as an instrument of the N.F.L. member clubs, violated the Sherman Act § 1, by restricting any economically independent entities from supplying goods or services related to professional football to the individual clubs. I use "upstream flow" as shorthand for products and services like players and coaches, television services, potential investors and the myriad of other integrated industries; member clubs do have independent and economically significant identities apart from the collective N.F.L. for the limited purposes of their

extra-league dealings with those upstream suppliers. See Weistart & Lowell, *Law of Sports*, § 5.11 (1978), 687, 692 esp. n. 86. Thus, § 1 can and should protect the competitive aspects of player drafts, disallow cross-ownership bans and exclusive television and equipment contracts, by insuring that any one club's interaction outside the confines of intra-league regulation of production of the sport is unfettered by the working of any intraleague rule.

This is the critical distinction between cases which invalidate various intraleague rules, and those which uphold them. That member clubs compete for investors and the services of talented players is underscored by the fact that, although aggregate revenues are shared among all member clubs, there is no intra-league regulation upon the form of investment by a member club's financial backers, the dividend policy, or operating expenses and expenditures of any member for player services. League regulations comport with economic reality in this sense; courts have merely applied a similar philosophy to other aspects of the professional leagues' operations, including, *inter alia*, club-player relationships. *See, e.g., Smith, supra* (N.F.L. player draft held to violate § 1, even though N.F.L. teams not "economic" competitors, because it "forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power."); *Mackey, supra,* (only relevant market in which to evaluate "Rozelle Rule" was that "for players' services"); *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F.Supp. 1049, 1061 (C.D.Cal.1971) (harm resulting from restriction on non-collegiate players' recruiting was these players' exclusion from market in which they sought to compete by reason of the monopoly power exerted by the N.B.A.); *accord, Linseman* v. *World Hockey Association*, 439 F.Supp. 1315, 1322 (D.Conn.1977); *Kapp* v. *National Football League*, 390 F.Supp. 73, 81-82 (N.D.Cal.1974), *appeal vacated*, 586 F.2d 644 (9th Cir.1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979) ("(a) conceivable effect of th(e "ransom" or "Rozelle" rule) would be to *perpetually* restrain a player from pursuing his occupation among the clubs

of a league that holds a virtual monopoly of professional football employment in the United States", which "goes far beyond any possible need for fair protection . . . and imposes upon the player-employers or the purposes of the N.F.L. such undue hardship as to be an unreasonable restraint . . ."); *cf.*, *North American Soccer League, et al.* v. *N.F.L., et al., supra,* (N.F.L. ban on cross-ownership of professional football and soccer league clubs violative of Sherman Act § 1).

The paradox to which I return, as the root of why the N.F.L., as well as other sports leagues, must be regarded as a "single entity" is that the keener the on-field competition becomes, the more successful their off-the-field, and ultimately legally relevant, collaboration. The formal entities, including the member clubs—including the Raiders—which the district court ruled to be competitors cannot compete, because the only product or service which is in their separate interests to produce can only result as a fruit of their joint efforts. This systemic cooperation trickles down to all members of the league, regardless of their on-the-field record, at least to the extent of the shared revenues. As at least one district court has previously recognized, despite some limited independently earned profit from "team paraphernalia" and "local broadcast revenues",

> (a) franchise's popularity is inextricably bound up with the quality of its competition on the playing field and the resulting excitement and sense of team loyalty.

Mid-South Grizzlies, supra, at 568. The ability to accrue separately accounted and disbursed profit, of which the district court made much, "is an indirect benefit of being a member of the league". *Id.*

A ruling that the N.F.L. cannot enforce Rule 4.3 is effectively ruling that it may not enforce any collective decision of its member clubs over the dissent of a club member, although this is precisely what each owner has contractually bargained for in joining the enterprise. Without power to reach collective decisions, the N.F.L. structure becomes superfluous, and professional sports, without a cost-effective policing mecha-

nism such as the league, will dissolve in the face of uncontrollable free-riding and loss of economies of scale. *Broadcast Music, Inc.* v. *Columbia Broadcast Systems, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979).

Not only did the district court underrate the business scenario in which the member teams cooperate far more than they compete in the legally irrelevant on-field sense, but its directed verdict on the single entity issue ignored two significant aspects of the N.F.L.'s organization. First, the N.F.L. member clubs pool their revenues to a degree unique even among sporting leagues. By focusing upon the separate calculation of profits and loss by members, the district court elevated form over substance. Profit, as currently understood in the accounting profession, is a term of art, and as such is inherently subjective, often manipulated by equity interests to serve legally irrelevant business motives. The relevant consideration, as the N.F.L. has recognized by implementation of its shared revenue concept, is total infusion of consumer dollars into the sport, and some predictable and centrally administered allocation of those jointly earned revenues among member clubs. After that purpose, the members adopt the only workable model for earning and distributing the revenues from sale of non-severable and indistinct product—professional football. See generally, Quirk, *An Economic Analysis of Team Movements in Professional Sports,* 38 Law & Contemporary Problems 42 (1973).

The product distributed by the member clubs is not analogous to ball bearings (*Timken Roller Bearing Co.* v. *U.S.*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951)), mattresses (*U.S.* v. *Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967)), or groceries (*U.S.* v. *Topco Associates,* 405 U.S. 596, 598, 92 S.Ct. 1126, 1128, 31 L.Ed.2d 515 (1972)), because stripped of the N.F.L. rules, participation in a regulated draft, orderly schedules and league standings, professional football is indistinguishable from sand lot follies. This inescapable fact of interdependence distinguishes the N.F.L. franchisees and professional football from other industries comprised of "separate business entities whose products have

independent value" (519 F.Supp. at 584) banded together in *de facto* cartels. *C.f., Broadcast Music Inc., supra; Associated Press et al.* v. *United States,* 326 U.S. 1, 18, 65 S.Ct. 1416, 1423, 89 L.Ed. 2013 (1945) (Douglas, J., in concurring, notes that it is unclear whether the AP system would violate Sherman Act § 1).

There was no evidence before the district court establishing that a member club of the N.F.L. could, or would seek to, defect to the U.S.F.L., thereby transferring its assets in quest of greater exploitation. Only such a showing, or an alternative theory, supported by evidence in the record could illustrate that any particular member club had an intrinsic value shorn of its affiliation with the N.F.L., and thus could support the district court's result. We find no such evidence in the record. *C.f. Associated Press, supra* (newspapers which sought to affiliate did not share revenues, and each produced separate and distinct products with intrinsic value). There is no evidence that any of the member clubs' investors would have committed time or capital investment without the existing league structure. Without the league, professional football becomes a pursuit no more substantial than a group of finely-tuned athletes traveling haphazardly about, in search of playing competition. *Accord, Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968).

Not only is it legally irrelevant that a second professional league has sprung up, since the U.S.F.L. did not exist at the time of trial, but since the two leagues' schedules do not overlap, one should not hypothesize as to any competitive relationship between the two, or the effect such inter-league competition would portend for the validity of intra-league regulation. Thus, while I find issues of supposed competitive relations between the N.F.L. and U.S.F.L., or between existing and any new franchisees, intellectually interesting, I also dismiss any legal conclusions based upon these entities as speculative.

Holding that the N.F.L. is not a single entity, but rather an aggregation of economic competitors, is tantamount to ruling

that the N.F.L. structure is itself *per se* invalid under the Sherman Act § 1; this will spell the end of sporting leagues as are currently used in football, hockey, golf, soccer, basketball and countless other associations in industries with similar endemic characteristics. See *Board of Regents of the University of Oklahoma v. N.C.A.A.*, 707 F.2d 1147 (10th Cir.1983) *cert. granted*, ____U.S.____, 104 S.Ct. 272, 78 L.Ed.2d 253 (1983).

To elevate formal corporate characteristics of ongoing economic entities above the substance of what purpose and function the structure serves, and what product(s) emerge from the process would not only destroy the N.F.L., professional sports leagues, and the goodwill that results from continuity in national allocation of the sport throughout the country, but would create a rule of law casting all franchise/wholesale distribution relationships into inescapable doubt.

Rather than avoid creating an "exemption" from the Sherman Act for professional sporting leagues, failing to account for the substantial and unique characteristics extant in professional sports by refusing the N.F.L. review as a single entity creates turmoil and dissolves the analytic framework within which courts scrutinize agreements under Sherman Act § 1. It is unrealistic and inaccurate to lump intra-N.F.L. rules in with agreements binding separate economic entities which produce independent products and accrue independent revenues. See *Mid-South Grizzlies, supra; Levin, supra.* Rule 4.3 is no more a restraint on trade in professional football for Sherman Act § 1 purposes, than is an intra-corporate directive regulating the location or operation of its headquarters, franchise, or branch of a multi-outlet business. *See, e.g., Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

No "antitrust exemption" for the N.F.L. would be created by holding that it is a single economic entity for purposes of regulating franchise location. Section 2 of the Sherman Act, prohibiting monopolies and attempts to monopolize, remains fully applicable to all N.F.L. intra-league rules and activities. See *Mid-South Grizzlies, supra; c.f., Bowman* v. *N.F.L.*, 402

F.Supp. 754 (D.Minn.1975) (challenge brought by former W.F.L. players to N.F.L. teams as an illegal boycott and unjustified exercise of monopoly power); *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F.Supp. 462 (E.D.Pa.1972) (Sherman Act § 2 applied to bar hockey reserve clause).

Many present N.F.L. practices, including Rule 4.3, are highly suspect under the Sherman Act § 2 prohibitions, because notwithstanding the form or substance of the N.F.L.'s style of organization and operation, some practices appear calculated to create barriers to entry for would-be rival leagues in profitable geographical markets. In short, Sherman Act § 2 is the proper curb upon the N.F.L.'s successful exploitation of its intra-firm economies of scale and competitive advantages. *Radovich* v. *N.F.L.*, 352 U.S. 445, 453-54, 77 S.Ct. 390, 394-95, 1 L.Ed.2d 456 (1957) and particularly *American Football League* v. *N.F.L.*, 323 F.2d 124, 131 (4th Cir.1963) suggest the possibility of true economic competitors challenging the effect of intra-league rules upon nascent competition under § 2 of the Sherman Act.

The Raiders do not have standing to challenge Rule 4.3 under § 2; as part and parcel of the entity they knowingly joined in 1967, they may have a cause of action in contract against the rest of the N.F.L. for failure of their expectations arising from their membership, but cannot challenge intra-league regulations, as could would-be "upstream" suppliers or hopeful candidates for franchises like the Mid-South Grizzlies or the San Francisco Seals. See *San Francisco Seals* v. *National Hockey League*, 379 F.Supp. 966, 971-72 (C.D.Cal.1974). The Coliseum may be able to mount a successful challenge to Rule 4.3 upon a § 2 theory, but that issue is not presently before this Court.

As always, § 1 remains a viable theory under which those "upstream" aspects of member clubs' operations—those activities which the N.F.L. and previous courts acknowledge the individual members as economically distinct entities—could be challenged. An oft-tried, and frequently successful example of

this theory has been the player draft litigation; the distinction between instances in which the N.F.L. acts as a collective monitor of intra-league affairs, and those in which it intercedes at the behest of a member club for anti-competitive advantage over "upstream" bargaining entities outside the N.F.L.

The purposes for which the N.F.L. should be viewed as a single entity, impervious to § 1 attack, must be functionally defined as those instances in which member clubs must coordinate intra-league policy and practice if the joint product is to result. *See, Broadcast Music Inc., supra; GTE Sylvania, supra.* Prohibiting the N.F.L. from attempting to exploit a monopolistic position in the industry, or from cloaking concerted anti-competitive pressure upon extrinsic "upstream" suppliers in the guise of "league" restrictions, does not require that we strike ancillary terms of the franchise agreements between member clubs as anti-competitive. A principled approach requires that we distinguish one situation from the other, and protect both competitive markets for football players and television coverage, as well as the integrity of terms Al Davis agreed to as salient aspects of his arms' length negotiations with the other member clubs. Davis has received no more or less than he has bargained for, as a franchisee of the N.F.L.

To hold the N.F.L. a single entity for purposes of intra-league regulation of relocation of existing franchises, thereby cutting off Sherman Act § 1 liability in this instance, is fully consistent with the prior cases that address the validity of league regulation of member clubs. In such cases, the leagues' power has consistently been upheld. *See, e.g., A.F.L.* v. *N.F.L., supra; Mid-South Grizzlies, supra; San Francisco Seals, supra;* and *Levin, supra.*

I concur in the majority's opinion, insofar as it affirms the trial judge's denial of the appellants' motion for a change in venue. However, I would note the inappropriateness of applying the substantial body of case law dealing with racial bias in criminal venire to an instance where the strongest objections to the venue revolved around a highly attentuated [sic] financial or civic interest bestowed upon the jury by its deliberations concluding in favor of the L.A. Coliseum and

Raiders. I would commend the trial judge for his extraordinary care in screening out prospective jurors who showed even a hint of bias, in maintaining an orderly proceeding despite the high degree of press coverage and histrionic advocacy by the parties, and in assuring deliberations in an informed and unemotive manner. As a result of his painstaking care, I find that the appellants received the verdict of six fair and untainted jurors.

CONCLUSION:

Because the district court incorrectly determined that the N.F.L. member clubs are not engaged in a single enterprise for purposes of determining the location and marketing of professional football games between members, the jury verdict on the lawfulness of Rule 4.3 must not stand. Rule 4.3 cannot, as a matter of law, violate § 1 of the Sherman Act. The judgment of the district court should be reversed and judgment entered for the N.F.L. and its codefendants.

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT

C. D. CALIFORNIA

No. 78-3523-HP—July 24, 1981

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Defendants.

OAKLAND RAIDERS, LTD.,
Cross-Claimant,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Cross-Defendants.

Memorandum and Order granting directed verdict for plaintiff and cross-complainant on single entity issue

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PREGERSON, *Circuit Judge:*

This matter is before the court on cross-motions filed, pursuant to Fed.R.Civ.P. 50(a), by the plaintiff Los Angeles Memorial Coliseum Commission, the cross-claimant Oakland Raiders, and the NFL defendants, seeking entry of a directed verdict with respect to the defendants' contention that the NFL is a single economic entity for purposes of this lawsuit and hence cannot as a matter of law have violated section 1 of the Sherman Act. Having studied the parties' briefs and heard the oral argument of counsel on July 24, 1981, the court concludes that the motions of the Coliseum Commission and the Raiders should be granted and that of the NFL denied.

The Los Angeles Memorial Coliseum Commission originally moved before trial for partial summary judgment on the single entity issue. The court denied that motion because it appeared that proper resolution of the issue could well depend on the factual evidence adduced at the trial. Because summary judgment is proper only when it is quite clear what the truth is, *Poller* v. *CBS,* 368 U.S. 464, 467, 82 S.Ct. 486, 488, 7 L.Ed.2d 458 (1962), a district court may properly deny summary judgment even where it would be technically proper, so that the case may be fully developed at trial. *Roberts* v. *Browning,* 610 F.2d 528, 536 (8th Cir. 1979).

That development has now occurred, and it is apparent that there are no genuine issues of material fact concerning the single entity question. The parties' disagreement concerns the legal effect to be given to the undisputed facts. The question is a close one, and the court has benefitted greatly from the briefs and oral arguments of the parties. Careful consideration of the legal arguments put forward by the Coliseum and by the NFL have convinced this court that the undisputed facts preclude treating the NFL as a single entity for purposes of this lawsuit.

On its face, the NFL certainly appears to be an association of separate business entities rather than one single enterprise. The twenty-eight member clubs are separate legal entities—some corporations, some partnerships, and some sole proprietorships. No two clubs have a common owner. The clubs share a large part, but not all, of their revenues. They do not share their profits or losses. They are managed independently, each making its own decisions concerning ticket prices, player acquisitions and salaries, the hiring of coaches and administrators, and the terms of their stadium leases. They do not exchange or share their accounting books and records.

The Supreme Court has consistently rejected the single-entity argument in circumstances more favorable to that argument than those presented in this case. Firms with a high degree of common ownership have been held separate for Sherman Act purposes. *See Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, 597-98, 71 S.Ct. 971, 974, 95 L.Ed. 1199 (1951); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,*

Inc., 340 U.S. 211, 215, 71 S.Ct. 259, 261, 95 L.Ed. 219 (1951); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227-28, 67 S.Ct. 1560, 1565, 91 L.Ed. 2010 (1947). Indeed, even a parent corporation and its subsidiary have been held separate entities in a Sherman Act context: since they had "availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42, 88 S.Ct. 1981, 1985-86, 20 L.Ed.2d 982 (1968).

The Ninth Circuit has taken a similarly unreceptive view of single-entity claims, as demonstrated by *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977). The defendants there were two newspaper-publishing corporations, one a wholly-owned subsidiary of the other. The Ninth Circuit was reluctant to characterize these firms as a single entity for Sherman Act purposes, stating only (in dictum) that they were "[a]rguably" one enterprise. Yet not only were the two firms parent and subsidiary, but one individual had control of the parent, was president of both corporations, and published all of both companies' newspapers. Moreover, the firms shared many key personnel, their newspapers exhibited numerous common features, and the two companies did not compete. If all these features together were insufficient to establish a single enterprise, it is difficult to see how the NFL can constitute a single entity when it possesses *none* of those features.[1]

The League argues, however, that the unitary nature of the product it creates—NFL football—necessarily implies that it is a single entity. "[T]he economic substance is that of a single firm selling a single product involving a necessary contribution from each member." *NFL Opposition* at 3. This argument suffers from several defects.

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[1] The NFL is not the "parent" of any league member, nor do any two clubs have a common owner. The clubs do not share key operational personnel. And the NFL itself has conceded that "the existence of actual or potential inter-club competition in certain areas is not disputed." *NFL's Opposition to Motion for Partial Summary Judgment*, filed February 20, 1981 [hereinafter *NFL Opposition*], at 29.

In the first place, the argument, if valid, would prove too much. If the NFL must be treated as a single entity in this lawsuit simply because all its teams must cooperate to produce the League product, the NFL should be just as much a single entity—and hence just as incapable of violating section 1 of the Sherman Act—in cases challenging League restrictions on the acquisition of players. Yet such League rules have repeatedly been found to violate section 1. *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C.Cir.1978); *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); *Kapp* v. *NFL*, 390 F.Supp. 73 (N.D.Cal. 1974), *aff'd on other grounds*, 586 F.2d 644 (9th Cir. 1978).[2]

Secondly, organizations whose product is just as unitary as the NFL's and requires the same kind of cooperation from the organization's members, have been found to violate section 1 of the Sherman Act. The clearest instance is *Associated Press* v. *United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), where Associated Press bylaws aimed at preventing competitors of existing members from joining the association were held unlawful. Associated Press was an incorporated membership association whose members were newspapers. It gathered and distrubuted "news which [its] member papers cannot collect single-handed, and which requires their pooled resources." *Id.* at 26 (Frankfurter, J., concurring). This was a product or service distinct from that of the member publishers, and one requiring the cooperation of all the members, none of whom

[2] The NFL argues that the player cases are distinguishable because they challenged NFL conduct in a different market—the market for player services, rather than the market in which NFL football is sold. "In the player market . . . each club had the capacity to employ players without necessarily involving other clubs in such contracts." *NFL Opposition* at 39. The distinction is unconvincing. Each club likewise has the capacity to lease a stadium without involving the other clubs in its contract. Of course, the other clubs will be "involved" in the sense that they will have to play in the leased stadium. But they are similarly "involved" when one club employs a player in the sense that they will have to play against that player. In short, players no less than stadiums are a factor in producing professional football, and if the nature of professional football makes its producer, the NFL, a single entity, that conclusion would apply as much in the player market as in the stadium market.

had the facilities or resources to produce AP's stream of worldwide news. Yet the Court had no trouble finding AP's anticompetitive bylaws a restraint of trade.[3] Likewise, in *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 365, 83 S.Ct. 1246, 1261, 10 L.Ed.2d 389 (1963), the Court held that the Exchange had violated section 1 of the Sherman Act. Yet the Exchange "perform[ed] an important function" by "serv[ing] . . . as an indispensable mechanism through which corporate securities can be bought and sold"—a function that none of its individual broker-members could perform on its own. *Id.* at 349, 83 S.Ct. at 1253.[4]

A third problem with the NFL's argument is that it seems to rest on a false premise—that the individual NFL clubs are not separate business entities whose products have an independent value. The League may be correct when it characterizes its member clubs as "[e]ntities which have capacity to be competitors *only* when acting jointly with members of a common enterprise." *NFL Brief on Cross-Motions for Directed Verdict re Single Entity,* filed July 23, 1981 [hereinafter *NFL Brief*], at 21. But this means only that each club must act jointly with *some* other teams in *some* cooperative framework in

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[3] *See also United States* v. *General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied,* 314 U.S. 618, 62 S.Ct. 105, 86 L.Ed. 497 (1941), affirming the conviction of four corporations for violating section 1 of the Sherman Act. The defendants were GM, its sales and financing subsidiaries GMSC and GMAC, and a subsidiary of GMAC. The defendants had argued that they all directed their operations "toward one end, the manufacture and sale of General Motors automobiles," *id.* at 384, and that GMAC and its subsidiary were thus merely parts of one common enterprise engaged in the unitary business of making and selling GM cars. The court rejected this defense. *Id.* at 404.

[4] The NFL would distinguish *Associated Press* and *Silver* as involving "organizations made up of firms, each of which were self-contained competitors separate and independent of their membership in the umbrella cooperative," unlike the NFL's member clubs. *NFL Brief* at 22. This is not, in the court's view, a "distinction of substance" as the NFL believes. *Id.* at 23. As discussed below, any individual NFL team could, in theory, withdraw from the NFL and join or found a new league. A team could even withdraw and try to present non-league exhibition games, as the Harlem Globetrotters do. Such a venture might be almost certain to fail—but then so would a stock broker who decided to quit the New York Stock Exchange and operate without a seat on any exchange.

order to produce football games. It does not show that each club can produce football games only as an *NFL* member. Indeed, many of the current NFL members—including plaintiff Raiders—previously operated as members of a rival football league. There is no conceptual reason why any NFL team could not decide to pull out and join a new league.[5] Thus, although the Raiders can create a product only in collaboration with other teams, it does not follow that they "have no capacity to be competitors separate and apart from their membership in the National Football League." *NFL Brief* at 29. Indeed, sports fans quite often wish to spend their money on the games of a particular team, not simply on "NFL football," "NBA basketball," or the like.[6]

Besides stressing its allegedly unitary product, the NFL relies principally on *North American Soccer League* v. *NFL*, 505 F.Supp. 659 (S.D.N.Y.1980), and *San Francisco Seals, Ltd.* v. *National Hockey League*, 379 F.Supp. 966 (C.D.Cal.1974). But these cases do not help the League in this lawsuit, for they arose in far different contexts. The *North American Soccer League* case arose in the very different setting of a clash between two separate professional sports leagues, and Judge Haight specifically noted that the single entity defense "fails where two member teams would compete in the

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[5] The NFL might insist that although an individual club could secede from the League and continue to take part in producing football games, it would not be producing *NFL football*. But that is a mere tautology and in no way shows that the League's product has a special unitary quality. Even the most blatant coalition of competing enterprises, charged with a Sherman Act violation, could argue that no other entity except the coalition itself could produce a "coalition product": this would not mean that every such coalition must be considered a single business entity.

[6] For this reason, the NFL's analogy with *Evans* v. *S. S. Kresge Co.*, 544 F.2d 1184 (3d Cir.1976), is unconvincing. *NFL Brief* at 19-20. That case involved a retailer, Hempfield, who operated the grocery departments of a number of defendant's K-Mart stores. The court found an absence of competition, since from a customer's viewpoint, "whether the . . . item was purchased from Kresge or from Hempfield, it was as if the item had been offered for sale by Kresge alone, but at two different locations in its K-Mart establishment." 544 F.2d at 1193. In our case, by contrast, few football fans would regard a Raiders game and, say, a Jets game as merely "NFL football" dispensed at different locations.

same geographical area for sports' fans dollars, and league restraint of that competition damages a stadium operator"—the precise situation alleged here. 505 F.Supp. at 677. *San Francisco Seals* turned on a finding that denial of the Seals's proposed move to Vancouver had no anticompetitive effect. That finding cannot automatically be transferred to this case, because the Seals, unlike the Raiders here, were not being prevented from moving into another team's home territory.

For the foregoing reasons, the court concludes that the NFL's member teams should be treated as separate business enterprises for purposes of this lawsuit, rather than as components of a single business entity. The NFL's arguments are by no means without force if marshalled in an attempt to demonstrate that the competitive activity of the NFL's teams presupposes a degree of mutual cooperation perhaps unique to the world of professional sports. But such unique features are relevant in weighing the reasonableness of the restraint at issue in this case—a task for the jury—and do not suffice to exempt that restraint from antitrust scrutiny altogether by establishing a single entity defense.

THEREFORE, IT IS ORDERED that the motions of the Coliseum Commission and the Raiders for directed verdict on the single entity issue be granted, and the NFL's motion be denied.

The Clerk of the Court is directed to serve copies of this order by United States mail upon the attorneys of record appearing for the parties herein.

APPENDIX C

APPENDIX C [1]

UNITED STATES DISTRICT COURT

C. D. CALIFORNIA

Civ. No. 78-3523-HP—Feb. 21, 1980

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE *et al.*,
Defendants.

Memorandum and Order granting plaintiff's motion for a preliminary injunction

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PREGERSON, *Circuit Judge*, sitting by designation.

This matter is before the court on plaintiff's motion for a preliminary injunction, which, according to plaintiff's moving papers, "could equally well be viewed as seeking summary judgment." After considering the pleadings, the memoranda of law, the affidavits, and the oral argument of counsel, the court has determined that the motion for a preliminary injunction should be granted. Insofar as the motion seeks summary judgment, however, summary judgment is denied.

In this action, the Los Angeles Memorial Coliseum Commission ("Coliseum"), seeks an injunction restraining the National Football League ("NFL") from invoking § 4.3 of the NFL's Constitution and Bylaws in connection with the contemplated transfer of the Oakland Raiders Football Club to the Los Angeles Memorial Coliseum. Section 4.3 requires an affirmative vote of three-fourths of the NFL team owners before a member club may transfer the location of its home

[1] This order was reversed on other grounds by the Court of Appeals. 634 F.2d 1197 (9th Cir. 1980).

games from one city to another.[2] The Coliseum claims that § 4.3 constitutes a division of territories among competitors, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Accordingly, pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26, the Coliseum seeks to enjoin the NFL from invoking the three-fourths vote requirement on the ground that enforcement of § 4.3 threatens to block the Coliseum and the Oakland Raiders from finalizing an agreement that would bring the Raiders to Los Angeles as the Coliseum's new NFL tenant.

In earlier proceedings on the motion to dismiss the complaint, this court found that plaintiff had not adequately alleged standing to bring the action. In an order dismissing the complaint with leave to amend, *Los Angeles Memorial Coliseum Commission* v. *N. F. L.*, 468 F.Supp. 154 (C.D. Cal. 1979), this court further stated that, assuming plaintiff could successfully amend the complaint to plead the prerequisites for standing, the legality of § 4.3 must be determined under a rule of reason analysis, because its mere existence did not constitute a per se violation of the Sherman Act.

The court finds that plaintiff has now met the standing prerequisites set out in the court's prior order, 468 F.Supp. at 162. Thus, plaintiff has alleged the following:

1) that it is reasonably likely that an existing NFL team is seriously interested in moving to Los Angeles;

2) that it is reasonably likely that a transfer team would decide to play its home games in the Coliseum;

3) that it is reasonably likely that a transfer team and the Coliseum would be able to agree on lease terms; and

4) that is is reasonably likely that pursuant to § 4.3, the NFL members will not approve the transfer of an existing team to Los Angeles and the Coliseum before the 1980-81 season.

Turning to the question of plaintiff's entitlement to an injunction under § 16 of the Clayton Act, the court notes that

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[2] Section 4.3 provides: "No member club shall have the right to transfer its franchise or playing site to a different city . . . without prior approval by the affirmative vote of three-fourths of existing member clubs of the League."

§ 16 provides for injunctive relief against threatened loss by a violation of the antitrust laws "when and under the same conditions and principles as injunctive relief against threatened conduct . . . is granted by courts of equity," 15 U.S.C. § 26. Therefore, before injunctive relief may be granted under § 16, the court must first determine whether plaintiffs have satisfied either of the two traditional equitable standards applicable to the grant or denial of a preliminary injunction.

I. PRELIMINARY INJUNCTION STANDARDS

In *William Inglis & Sons Baking Company* v. *I. T. T. Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1976), the Ninth Circuit set out two possible bases on which a preliminary injunction may be granted. The first requires the moving party to show (1) probable success on the merits, and (2) the possibility of irreparable injury. The second, or alternative, preliminary injunction standard requires the moving party to demonstrate only that (1) the suit raises "serious" questions of law, and (2) that the balance of hardships tips sharply in its favor. *See also Miss Universe, Inc.* v. *Flesher*, 605 F.2d 1130 (9th Cir. 1979).

Under the second standard, plaintiff is required to show that the balance of hardships tips sharply in its favor. Such a showing seems unlikely in this case since the alleged injury to the Coliseum in the absence of an injunction, i. e., lost revenues due to its failure to acquire an NFL team, is nearly evenly balanced by the financial injury that granting the injunction could cause to a third party, the Oakland Coliseum, due to its possible loss of the Raiders. This conclusion prevents the application of the alternative standard but does not end the court's inquiry. Under the first standard, plaintiff has demonstrated the requisite possibility of irreparable injury. This is so because the managing partner of the Raiders has indicated both that his club desires to play its home games in Los Angeles, and that the only significant obstacle to reaching an agreement with the Coliseum is the possible invocation of § 4.3. Having concluded that the possibility of irreparable injury

exists, what remains, under the first standard, is for the court to determine whether plaintiff has shown a probability or a likelihood of success on the merits of its antitrust claim.

This court has already ruled that the legality of § 4.3 must be tested under the rule of reason. *Los Angeles Memorial Coliseum, supra,* 468 F.Supp. at 164-166. Under the rule of reason, "the court must balance the anticompetitive evils of the challenged restraints against their procompetitive virtues to determine whether the restraints are reasonable and thus legal." *Id.* at 167. Thus, to determine whether plaintiff has shown that it is likely to succeed on the merits, the court, on the facts presently before it, must undertake a preliminary rule of reason analysis by weighing the procompetitive and anticompetitive effects of § 4.3. If the anticompetitive effects appear to outweigh the procompetitive justifications, a preliminary injunction in plaintiff's favor would be in order.

II. PRELIMINARY RULE OF REASON ANALYSIS

The court's previous order set out the following as a procompetitive virtue of § 4.3:

> In order for professional football games to be played (and thus for economic competition to exist), the teams . . . must agree on *where* the games are to be played. Games, traditionally, are played where one of the participating teams has its home city. Therefore, an agreement on where the games are to be played necessarily involves an agreement on the location of each team's home city. [Section] . . . 4.3 provide[s] a mechanism whereby the NFL teams can agree on where each transfer . . . team is to be located—to that extent [that section is an agreement] on where games are to be played.

468 F.Supp. at 166. It was this apparent procompetitive virtue which provided the court with the following rationale for

adopting the rule of reason, rather than a per se rule, as the appropriate mode by which to evaluate the lawfulness of § 4.3:

> Because these agreements promote competition to some extent, it cannot be said that they have a 'pernicious effect on competition' or that they lack 'any redeeming virtue.' *Northern Pacific R. Co.* [v. *United States,*], 356 U.S. [1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)] at 5, 78 S.Ct. at 518.

468 F.Supp. at 166.

In addition to functioning as a device to determine the sites where games are to be played, defendants have asserted that § 4.3 has certain other procompetitive aspects. The NFL argues, for example, that the rule "protects the value of each team's enterprise," and that it "provides the necessary incentive to develop and nurture such businesses." *See* NFL Brief in Opposition to Motion for Preliminary Injunction, 12-17. These justifications, however, seem to advance an argument that § 4.3 is procompetitive because it helps stabilize the professional football industry, by increasing profits and preserving the value of team franchises.

According to a recent opinion of the Supreme Court:

> The early cases . . . foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition . . . That kind of argument is properly addressed to Congress and may justify an exemption from the statute for special industries, but it is not permitted by the Rule of Reason.

National Society of Professional Engineers v. *United States,* 435 U.S. 679, 690, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637 (1978) (citations and footnote omitted). Thus, although "profit maximization is certainly in the best interests of the football industry, it is not, by itself, a procompetitive justification and, under *Professional Engineers* [*Id.* at 692, 98 S.Ct. at 1365], may not be factored into the reasonableness determination." *Los Angeles Memorial Coliseum, supra,* 468 F.Supp. at 167.

The primary anticompetitive aspect of § 4.3 is fairly self-evident: a rule which inhibits teams from transferring their home locations may act to prevent an existing team from transferring into the Los Angeles-Orange County area to compete with a team already there for dollars in the pockets of sports fans. In addition, a rule which hinders a new NFL team from moving into Los Angeles would inhibit local competition for football players, coaches, and other personnel. The extent to which a League's voting requirements restrict transfers of home locations from one city to another is, of course, dependent on the size of the vote required to approve a transfer. If an NFL team, desiring to play its home games in Los Angeles, must first win the unanimous approval of all teams in the League,[3] then its intentions obviously could be frustrated by the negative vote of a single team. Lower percentage vote requirements would, of course, constitute less of an obstacle to individual team decision-making, and would still provide a mechanism for determining the locations at which games are to be played.

This court's previous order noted that the mere fact that "some sort of agreement is needed to determine where each team is to have its home city . . . does not necessarily mean that it is reasonable and thus legal for the agreement to contain a three-fourths vote requirement." 468 F.Supp. at 166.

In a rule of reason case, the Ninth Circuit quoted with approval the following language from a Supreme Court decision:

> "To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is *fairly necessary,* in the circumstances of the particular case . . ." *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U.S. 373, 406, 31 S.Ct. 376, 384, 55 L.Ed. 502 (1911).

Anderson v. *American Automobile Association,* 454 F.2d 1240, 1246 (9th Cir. 1972) (emphasis added). In other words,

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[3] When the present suit was first filed, § 4.3 required a unanimous vote to approve transfers. *See* Plaintiff's Supplemental Brief, Appendix A.

although defendants can show that the rule in question has sufficient procompetitive merit to justify examining its lawfulness under the rule of reason analysis, a court may not uphold the restraint unless, with respect to the public and the parties, the restraint is limited to what is fairly necessary to obviate the concerns that brought it into being. If the restraint is more restrictive than "fairly necessary, in the circumstances of the particular case" it will be considered unreasonable, and thus in violation of § 1 of the Sherman Act.

In this case, the rule of reason analysis applies because some agreement among the teams is essential to permit the formation of an organized league. In determining whether the agreement or rule in question is reasonable, however, the court should assess the rule's ability to accommodate two competing interests: (1) the interests of the NFL in binding member teams to an agreement on where games will be played, and (2) the interest of the individual team in establishing its home location in whichever city it selects. A three-fourths vote requirement, by which eight out of twenty-eight teams can block the transfer of another team, appears to more than meet the NFL's interest, while giving marginal support to the interest of the individual team desiring to relocate. A majority vote requirement, on the other hand, would seem to provide a fairer accommodation of league and individual team interests. Furthermore, a majority vote requirement, in a matter affecting the public interest, is more consistent with the traditions of our democratic society.

Although the court considers the question to be close, the balance on the rule of reason scale appears to tip slightly in favor of plaintiff. Plaintiff has therefore shown sufficient likelihood of success on the merits to be entitled to a preliminary injunction.

The record is insufficient, however, to permit the court to grant plaintiff summary judgment. As was made clear during the hearing on the preliminary injunction motion, *see* Reporter's Transcript at 76-77, several material facts remain in dispute. Further evidence as to the business of professional football, the purpose, effect, nature and history of § 4.3, the

reason why the rule was imposed, and plaintiff's threatened injury must still be added to the record before the court will be in a position to rule on a motion for summary judgment under Fed.R.Civ.P. 56.

III. THE INJUNCTION

IT IS HEREBY ORDERED that defendants are enjoined, pending the determination of this action, from enforcing § 4.3 of the National Football League's Constitution and Bylaws, as currently written, to prevent the Oakland Raiders Football Team, or any other NFL football team, from transferring the location of its home games to the Los Angeles Memorial Coliseum. It is, of course, understood that such an injunction, which merely restrains the invocation of § 4.3, does not force or require any team to take any action against its will.

IT IS FURTHER ORDERED that this Memorandum and Order shall constitute the court's findings of fact and conclusions of law as authorized by Fed.R.Civ.P. 52.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Memorandum and Order, by United States mail, upon the attorneys of record for the parties appearing herein.

APPENDIX D

APPENDIX D

UNITED STATES DISTRICT COURT

C. D. CALIFORNIA

No. 78-3523-HP—Feb. 28. 1979
As Amended May 16, 1979

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE et al.,
Defendants.

Memorandum and order granting defendants' motions to dismiss with leave to amend and denying plaintiff's motion for partial summary judgment

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PREGERSON, *District Judge.*

This case requires the court to examine certain provisions of the constitution and by-laws of a professional sports league in the context of the nation's antitrust laws. Plaintiff, the Los Angeles Memorial Coliseum Commission ("Coliseum") contends that the National Football League ("NFL") and its twenty-eight member teams stand in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Specifically, the Coliseum challenges the validity of sections 3.1 and 4.3 of the NFL's Constitution and By-laws, which require an affirmative vote of three-fourths of the team owners before a member club may transfer its franchise from one city to another or before a new member club may be admitted into the NFL.[1] The

[1] Section 3.1(b) provides: "The admission of a new member club . . . shall require the affirmative vote of three-fourths of the existing member clubs of the League."

Section 4.3 provides: "No member club shall have the right to transfer its franchise or playing site to a different city . . . without prior approval by the affirmative vote of three-fourths of existing member clubs of the League."

Coliseum seeks to enjoin defendants, under § 16 of the Clayton Act, 15 U.S.C. § 26, from enforcing sections 3.1 and 4.3.

The NFL, an unincorporated association, and its twenty-eight member teams are engaged in the business of producing public entertainment in the form of professional football games. The NFL is the only "major league" professional football organization operating in the United States. Each team, which is separately owned, is located in a particular city and plays all of its "home games" in that city. Though the teams do not pool profits or generally share expenses,[2] they do act concertedly by cooperating with each other in a number of significant ways. Pursuant to the NFL's Constitution and By-laws, this cooperation includes promulgating uniform playing rules, organizing and scheduling games, sharing television revenues and ticket receipts, and administering a joint player selection system (the "draft") whereby negotiating rights to college and other non-NFL football players are allocated among the teams. In addition, when the NFL expands and accepts a new team into the League, existing clubs help stock the expansion franchise by making players available from their own rosters. Sections 3.1 and 4.3, challenged in this action, represent two other ways in which the teams have chosen to act concertedly.

This lawsuit arose because of the decision by the Los Angeles Rams football team, a member of the NFL, to discontinue playing home games in the Coliseum and instead to play them in Anaheim, a city located south of Los Angeles in Orange County, California. The change will be effective as of the 1980-81 football season. Thus, as matters now stand, the 1980-81 season will find the Coliseum without a professional football team for the first time since 1946, when the Rams started to play there. Because the Rams' departure will allegedly lead to a loss of revenue and other financial injury, and because the Coliseum believes that the County of Los Angeles should have a professional football team, the Coliseum now wishes to obtain another NFL team to replace the Rams. This replacement team could either be an existing team now located in another city, or could be a new team created by the

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[2] The teams do share the expense of the League office and engage in joint promotional activities.

NFL. The three-fourths vote requirement embodied in sections 3.1 and 4.3, however, looms as an obstacle blocking the attainment of the Coliseum's desires—an obstacle the Coliseum would like struck down.[3]

Before the court are defendants' motions to dismiss for lack of standing and justiciability,[4] and the Coliseum's motion for partial summary judgment under § 1 of the Sherman Act. After considering the pleadings, the memoranda of law, the affidavits of William R. Robertson, Gary W. Hoecker, and Pete Rozelle, and the oral argument of counsel, the court rules that the motions to dismiss should be granted with leave to amend and that the motion for partial summary judgment should be denied.

I. MOTIONS TO DISMISS

The NFL and its member teams assert in companion motions to dismiss that the Coliseum lacks standing to bring this action and that this matter is not justiciable. The standing and justiciability issues overlap to a significant degree and so will be considered together, under the rubric of standing.

In resolving the standing question, the court's lodestar must be the language of § 16 of the Clayton Act, 15 U.S.C. § 26. Section 16, in relevant part, provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive

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[3] The Coliseum alleges that sections 3.1 and 4.3 of the NFL's Constitution and By-laws "have had, and continue to have, the direct effect of precluding and impeding plaintiff from successfully conducting . . . negotiations with the owners of NFL franchises for the relocation of such a franchise to Los Angeles." Supplemental and Amended Complaint for Injunctive Relief under the Antitrust Laws, ¶ 19 at 9. The Coliseum further alleges that these provisions "preclude and impede plaintiff from initiating efforts to have established a new NFL franchise for Los Angeles." *Id.*

[4] The Chargers Football Company (San Diego Chargers) has not filed an answer to the complaint, has not joined in the motions to dismiss filed by the other defendants, and has not joined in opposing the motion for partial summary judgment filed by the Coliseum. At oral argument on January 8, 1979, the court was informed that, as of that date, the Chargers had not yet been served with a copy of the summons and complaint.

> relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . .

The key Ninth Circuit decision construing § 16 is *In re Multidistrict Air Pollution M.D.L. No. 31,* 481 F.2d 122 (9th Cir.), *cert. denied,* 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973) ("*Vehicle Air Pollution*"). In *Vehicle Air Pollution,* the court found that plaintiffs, who were crop farmers, had standing to seek injunctive relief under § 16. The gist of the farmers' antitrust complaint was that the nation's automobile manufacturers had conspired to eliminate competition in the research, development, manufacture, installation, and patenting of automobile air pollution control devices; that this conspiracy had retarded the development of such devices; and that as a result thereof the farmers had suffered lower crop yields because of additional air pollution.

A. ***Injury to Plaintiff***

The Ninth Circuit in *Vehicle Air Pollution* held that a plaintiff must allege an injury cognizable in equity to gain standing under § 16. The farmers in that case met this requirement by alleging that defendants' antitrust violations had caused diminished crop yields. In the case at hand, the Coliseum alleges that it faces a loss of revenue resulting from the relocation of the Rams to Anaheim and the Coliseum's asserted inability to procure a transfer or an expansion team because of the obstacles created by the challenged sections of the NFL's Constitution and By-laws. This alleged loss of revenue is analogous to the farmers' loss of revenue due to diminished crop yields and is an injury cognizable in equity.

The NFL and its member teams contend, nevertheless, that the Coliseum has not alleged a sufficiently immediate

injury to satisfy the "case or controversy" requirement of Article III of the Constitution. "The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *O'Shea* v. *Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1973). Defendants point out that the Coliseum's alleged loss of revenue, resulting from its loss of a professional football team as a tenant, will not occur—if at all—until well over a year from now. It is possible, defendants argue, that before the 1980-81 football season dawns, the NFL clubs will vote either to allow an existing team to move to the Coliseum or to allocate an expansion team for Los Angeles and the Coliseum. As of now, no votes, either affirmative or negative, have been taken. In a nutshell, the defendants say that nothing actually has happened and that the Coliseum is merely seeking an advisory opinion from this court.

Defendants' argument is clearly at odds with the language of § 16 of the Clayton Act. Section 16 specifically declares that a plaintiff may sue for "threatened loss or damage." As the Supreme Court held in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969):

> [Section 16] authorizes injunctive relief upon the demonstration of "threatened" injury. That remedy is characteristically available even though the plaintiff has not yet suffered actual injury . . .; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. [Footnote omitted.]

Plainly, this suit need not be postponed by the Coliseum until it actually suffers injury by finding itself at the commencement of the 1980-81 season without the Rams or any other professional football team as a tenant.

Zenith Radio teaches that not only must there be a threat of injury, but that the threat must be significant for injunctive relief to be granted. To satisfy the requirement of significant threat of injury and to withstand a motion to dismiss for lack of standing the Coliseum must allege: 1) that the Rams will

cease playing home games at the Coliseum as of the 1980-81 season; and 2) that it is reasonably likely that, before the start of the 1980-81 season, the NFL clubs will not approve the transfer of an existing team to the Coliseum or the placement of an expansion team there.

Defendants assert, however, that these two allegations describe a threatened injury too speculative to pass the "case or controversy" test. They rely principally on the abortion decision, *Roe* v. *Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). In *Roe,* although the wife was not pregnant and thus not immediately faced with a denial of an abortion, a married couple sought to challenge Texas statutes that generally prohibited abortions. The Supreme Court held that the couple lacked standing because their injury was too speculative and indirect. "Their alleged injury [the denial of an abortion] rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health." *Id.* at 128, 93 S.Ct. at 714.

The situation in the instant case is a far-cry from that presented in *Roe.* The Supreme Court's decision in *Roe* seems to rest on the belief that the contingencies present in that case had only a slight chance of occurring. Here, two things must happen before the Coliseum suffers actual injury, but one of these—the Rams' move to Anaheim—cannot be considered a contingency since both sides agree that it will in fact occur. With respect to the remaining contingency—the possible negative vote of the NFL owners on the question of a new team for Los Angeles—it has, to say the least, some fair chance of occurring.[5] Thus, the Coliseum's threatened injury cannot be considered speculative or indirect.

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[5] As to whether the contingency remaining in this case has a sufficient change of occurring, the situation here, rather than being akin to *Roe,* seems to be closer to *Industrial Communications Systems, Inc.* v. *Pacific Telephone & Telegraph Co.,* 505 F.2d 152 (9th Cir. 1974). There the Ninth Circuit found a sufficient allegation of threatened injury under § 16 where two contingencies stood between the threat and the occurrence of injury. The complaint alleged that defendants Pacific Telephone & Telegraph Co. and General Telephone Co. were threatening to injure plaintiffs by proposing to enter the one-way

(footnote continues)

Therefore, the Coliseum can satisfy the injury requirement of the § 16 standing test by making the allegations, numbered one and two, set forth above. The complaint does allege that the Rams will leave the Coliseum as of the 1980-81 season. But that pleading does not allege the second element—that it is reasonably likely that, prior to the 1980-81 season, the NFL clubs will not approve the transfer of an existing team to the Coliseum or the placement of an expansion team therein. Therefore, the motion to dismiss must be granted with leave to amend.

B. ***Proximate Cause***

The requirement of proximate cause limits the class of persons granted judicial relief by precluding certain persons from obtaining any recovery, even though their injuries were caused by defendant's violation of a duty. As Dean Prosser aptly put it:

> [Proximate cause] is sometimes said to be a question of whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusions in terms of legal policy, so that this becomes essentially a question of whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred.

W. Prosser, *Law of Torts* 244 (4th ed. 1971).

The NFL and the member clubs assert that a proximate cause limitation developed under § 4 of the Clayton Act, 15 U.S.C. § 15, the so-called "target area requirement," applies with more or less equal strength to § 16 situations. Section 4 delineates the persons who may sue for treble damages for

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(footnote continued)

radio signaling business in Los Angeles in violation of the antitrust laws. The Ninth Circuit found that plaintiffs had standing even though the California Public Utilities Commission still had to approve the defendants' tariffs and the Federal Communications Commission still had to grant the requisite radio licenses before the defendants could enter the market.

violation of the antitrust laws.[6] To limit the number of persons who may reap the benefit of treble damages, the Ninth Circuit held in *Vehicle Air Pollution,* and in other cases, that standing under § 4 will be granted only to those whose injury is within the "target area" of the antitrust violation.[7]

Though the court in *Vehicle Air Pollution* did not specifically address the issue raised by the defendants here, it is clear from the opinion that the target area approach is irrelevant to the question of standing under § 16. The crop farmers in that case were denied standing under § 4 because their injury was not within the target area of the alleged conspiracy by the automobile manufacturers.[8] But the farmers were granted standing under § 16. The only conclusion that can be drawn from these companion holdings is that the target area requirement is inapplicable to the § 16 analysis. Furthermore, the very thing that prompted this Circuit to adopt the target area approach—the availability of treble damages under § 4—is absent from a suit for injunctive relief under § 16. As the court stated in *Vehicle Air Pollution,* standing requirements under

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[6] Section 4 of the Clayton Act, 15 U.S.C. § 15, reads:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[7] The Ninth Circuit most recently defined the "target area" test in *Solinger* v. *A & M Records, Inc.,* 586 F.2d 1304, 1311 (9th Cir. 1978): "In order to have standing under section 4 . . . , [plaintiff] must show that the injury occurred within an area of the economy that foreseeably would have been affected by the antitrust violation alleged."

[8] The court in *Vehicle Air Pollution* stated that:

> [The] area of the economy against which anticompetitive conduct was allegedly directed was that concerned with research, development, manufacture, installation and patenting of automotive air pollution control devices. No commercial interest of the crop farmers falls within this area. Not only were the crop farmers not targets of the alleged conspiracy, they were not even on the firing range.

481 F.2d at 129 (footnote omitted). The court went on to state that plaintiffs who fall within the target area would "include an alleged inventor and a manufacturer of motor vehicle air pollution control equipment who claim losses from asserted inability to market their devices." *Id.* at 129 n.10.

§ 16 can be more lenient than those under § 4 because "section 16 does not involve punitive and potentially disastrous judgments for treble damages and attorneys' fees; neither is there the potential threat of duplicative recoveries." 481 F.2d at 130 (footnote omitted).

Though the strict target area test of proximate cause is inapplicable to this case, to have standing, the Coliseum must nevertheless allege that its injuries will be "proximately caused" by the defendants' challenged rules. *Universal Brands, Inc.* v. *Philip Morris, Inc.*, 546 F.2d 30 (5th Cir. 1977), *cited with approval in John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495, 500 n.5 (9th Cir. 1977). The Coliseum has adequately pled proximate cause.

C. *Causation in Fact*

Finally, to be granted standing, the Coliseum must allege that the NFL's Constitution and By-laws will in fact cause the Coliseum to be without a professional football team as a tenant, resulting in a loss of revenue. *Warth* v. *Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

To allege the necessary causal relationship, it would seem that the Coliseum must, at a minimum, allege that it is reasonably likely that the NFL clubs will not approve a transfer to Los Angeles or an expansion team for Los Angeles prior to the 1980-81 season. For if the clubs are in fact willing to approve a replacement team, it could not be said that the three-fourths vote requirement, embodied in sections 3.1 and 4.3 of the NFL's Constitution and By-laws, will cause the Coliseum any harm.

Furthermore, as the defendants point out, a number of things could happen that would prevent the Coliseum from obtaining a team regardless of whether the owners vote to deny a replacement team for Los Angeles. For example, a transfer or an expansion team might decide to play in a stadium in Los Angeles County other than the Coliseum. If such were true, then, as far as the Coliseum is concerned, any vote of the team owners would be irrelevant. Thus, the question arises whether, to allege causation, the Coliseum must allege that the likely

future events are such that the only thing blocking it from obtaining a team is the probable negative vote of the owners. In other words, must the Coliseum allege that injunctive relief will, if granted, significantly affect its chances to obtain another team?

As discussed earlier, the Supreme Court in *Zenith Radio* held that a § 16 plaintiff must "demonstrate a significant threat of injury . . . from a contemporary violation [of the antitrust laws] likely to continue or recur." 395 U.S. at 130, 89 S.Ct. at 1580. If, for example, it is likely that the only team that wants to move to Los Angeles desires to play in the Rose Bowl, then there is no *significant* threat of injury to the Coliseum *resulting from* section 4.3 of the NFL's Constitution and By-laws, the section that relates to the transfer of teams. Thus, to state the requisite "significant threat," the Coliseum must allege a reasonable likelihood that an affirmative vote by the club owners would bring a team to the Coliseum.

The court's conclusion is supported by the recent holdings of the Supreme Court on the question of standing to sue. In *Warth* v. *Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), plaintiffs challenged the legality of the zoning ordinance of the town of Penfield, New York. They alleged that the ordinance had the purpose and effect of excluding persons of low and moderate income from living in Penfield. Among the plaintiffs were four low and moderate income individuals who desired to live in Penfield, but who allegedly were precluded from doing so by the ordinance. The Court denied them standing. It said that even if the ordinance had the effect of excluding low and moderate income individuals, the plaintiffs had failed to allege that builders stood ready to construct housing at a price plaintiffs could afford, if the ordinance were struck down. Without such an allegation, no actionable causal relationship could be said to exist, nor could it be said that court-ordered relief would benefit the plaintiffs in a tangible way. It follows, therefore, that just as the plaintiffs in *Warth* had to allege that the likely future actions of builders were such that the only thing blocking their access to housing in Penfield was the challenged ordinance, the Coliseum here must allege that the likely future events are such that the only thing

preventing it from obtaining a transfer or an expansion team is the probable negative vote of more than one-fourth of the owners.

The standard this court must apply, in deciding whether court-ordered relief would benefit the Coliseum in a tangible way and whether an actionable causal relationship exists, was most recently stated by the Supreme Court in *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38, 41-42, 96 S.Ct. 1917, 1924, 1926, 48 L.Ed.2d 450 (1976):

> [W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision.
>
> . . . .
>
> . . . [T]he "case or controversy" limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party . . . .

Accord, Starbuck v. *City & County of San Francisco,* 556 F.2d 450 (9th Cir. 1977); *Bowker* v. *Morton,* 541 F.2d 1347 (9th Cir.1976).

Thus, with respect to the claim that section 4.3 violates the antitrust laws and precludes the Coliseum from obtaining a transfer team, the complaint must allege the following to set forth an actionable causal relationship indicating that court-ordered relief would benefit the Coliseum:

1) that it is reasonably likely that an existing NFL team is seriously interested in moving to Los Angeles;

2) that it is reasonably likely that a transfer team would decide to play its home games in the Coliseum;

3) that it is reasonably likely that the transfer team and the Coliseum would be able to agree on lease terms; and

4) that it is reasonably likely that pursuant to section 4.3, the NFL members will not approve the transfer of an existing team to Los Angeles and the Coliseum before the 1980-81 season.

Elements one and two are adequately alleged in the Coliseum's complaint, but not elements three and four. Therefore, the complaint is dismissed with leave to amend.

Similarly, with respect to the claim that section 3.1 violates the antitrust laws and precludes the Coliseum from obtaining an expansion team, the following must be alleged:

1) that it is reasonably likely that the NFL will not place an expansion team in Los Angeles and the Coliseum before the 1980-81 season;

2) that it is reasonably likely that an owner can be found for an expansion team in Los Angeles;

3) that it is reasonably likely that an expansion team would decide to play in the Coliseum; and

4) that it is reasonably likely that an expansion team and the Coliseum would be able to agree on lease terms.

None of these facts have been alleged. Again, therefore, the complaint must be dismissed with leave to amend.

In conclusion, the motion to dismiss is granted with leave to amend so that the Coliseum may adequately plead the existence of threatened injury and causation in fact, as more particularly set forth above. This is necessary to insure that the Coliseum "has 'alleged such a personal stake in the outcome of the controversy' as to warrant [its] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [its] behalf." *Warth* v. *Seldin*, 422 U.S. at 498-99, 95 S.Ct. at 2205.

II. MOTION FOR PARTIAL SUMMARY JUDGMENT

The Coliseum moves for partial summary judgment on the ground that sections 3.1 and 4.3 of the NFL's Constitution and

By-laws violate § 1 of the Sherman Act. Because the Coliseum has not adequately pled standing, a jurisdictional requirement in federal courts, partial summary judgment may not be granted irrespective of the merits of the Coliseum's claim.

In all likelihood, however, the Coliseum will be able to state the necessary allegations in its amended complaint. Accordingly, the court believes it appropriate to address at this time the issues raised by the Coliseum's motion so that this litigation may move forward expeditiously.

A. *Are NFL Teams Economic Competitors?*

The dominant purpose of § 1 of the Sherman Act is to maintain competition among independent business firms. L. Sullivan, *Antitrust* 152-54 (1977). The NFL and its member teams assert that the teams are not independent firms who engage in economic competition but rather are joint venturers,[9] and as such are beyond the reach of § 1 of the Sherman Act.

Whether NFL teams engage in economic competition as independent units is a troublesome question.[10] The relationship between the teams does not fit the traditional competitive

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[9] Strictly speaking, the NFL teams are not engaged in a joint venture. "A joint venture is a joint business undertaking of two or more parties who share the risks as well as the profits of the business." 10 Von Kalinowski, *Antitrust Laws and Trade Regulation* § 73.08[1], at 73-165 (1977) (footnote omitted). Though the NFL teams share revenues, they do not share profits or losses.

[10] The opinion of the Court of Appeals for the District of Columbia in *Smith* v. *Pro Football, Inc.*, 193 U.S.App.D.C. 19, 593 F.2d 1173 (D.C. Cir. 1978, as amended on Jan. 31, 1979), illustrates the confusion surrounding the question whether NFL teams are economic competitors. In discussing whether to apply the *per se* or the rule of reason test of illegality under § 1 of the Sherman Act, the court flatly stated that "the NFL clubs which have 'combined' to implement the draft are not *competitors* in any economic sense. The clubs operate basically as a joint venture . . . ." Slip opinion at 24-25, 593 F.2d at 1178-1179 (footnote omitted). Yet in applying the rule of reason to the NFL draft, the court held that the draft "is undeniably anticompetitive both in its purpose and in its effect." *Id.* at 31, 593 F.2d at 1185. The court went on to say that: "The draft is anticompetitive in its effect on the market for players' services, because it virtually eliminates economic competition among buyers [the NFL teams] for the services of sellers." *Id.* at 32, 593 F.2d at 1186.

mold. As defendants point out, in certain areas cooperation among the teams, not competition, is required to produce an entertainment product. For example, the teams must adopt playing rules and agree to a playing schedule. In addition, the teams cooperate in a number of other significant ways, though this cooperation may or may not be essential to producing an entertainment product. For example, live gate receipts from all regular season games are divided "sixty-forty" between the home and visiting teams, after certain limited deductions are made. The television rights of all NFL teams are jointly sold to the networks and television revenue is divided equally among all the teams. With regard to expenses, the teams share the cost of the NFL office and the cost of conducting promotional activities. Finally, the teams cooperate in administering a player draft designed to promote competitive balance on the playing field. Competitive balance heightens spectator interest which translates into greater revenue for the NFL.

On the other side of the ledger, each NFL team is separately owned. Profits and losses are not shared. The teams compete for college players and NFL players who are "free agents."[11] This competition for players has an economic aspect because winning teams may bring in more revenue. Depending on their proximity, teams also may compete for fans. If another NFL team were to play its home games in the Coliseum, that team and the Rams would compete to some extent for fan support in the Southern California area and thus for ticket sales and other revenue. At present, the location of the San Francisco Forty-niners vis-a-vis the Oakland Raiders, the location of the Baltimore Colts vis-a-vis the Washington Redskins, and the location of the New York Jets vis-a-vis the New York Giants, suggests that these pairs of teams compete for dollars found in the pockets of football fans.

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[11] When a player signs a Standard Player Contract with a team, he becomes bound to that team for a certain period of time. Once that period expires, however, he then may become a free agent and negotiate a new contract with another team. *Mackey* v. *National Football League*, 543 F.2d 606, 610 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977).

Moreover, the fact that NFL teams cooperate or act concertedly in a number of significant ways is ambiguous evidence on the question whether they are economic competitors. These cooperative efforts may indicate the presence of antitrust violations rather than the existence of a joint venture that is immune from the antitrust laws. In fact certain cooperative practices adopted by the NFL that unduly restrict competition for players have been struck down as violative of the antitrust laws. *Smith* v. *Pro Football, Inc.*, 193 U.S.App.D.C. 19, 593 F.2d 1173 (D.C. Cir. 1978, as amended on Jan. 31, 1979) (NFL player draft held to be unreasonable restraint of trade in violation of § 1 of the Sherman Act); *Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977) (so-called "Rozelle Rule," which had the effect of restricting the movement of free agents between teams, held unlawful); *Kapp* v. *National Football League*, 390 F.Supp. 73 (N.D.Cal.1974), *aff'd on other grounds*, 586 F.2d 644 (9th Cir. 1978) (Rozelle Rule, NFL player draft, the "no tampering rule," and the Standard Player Contract held violative of the antitrust laws).

Furthermore, even if the court accepts the contention that the NFL teams are joint venturers, this does not necessarily mean that they are not economic competitors for purposes of § 1 of the Sherman Act. In *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951), the defendant companies attempted to justify the challenged restraints of trade by characterizing their operations as a joint venture. The Supreme Court rejected this argument:

> Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a "joint venture." Perhaps every agreement and combination to restrain trade could be so labeled.

Id. at 598, 71 S.Ct. at 975. Since the NFL teams are legally separate companies, the Supreme Court's reasoning would arguably apply to this case.

The court concludes that competition for players and, depending on a team's location, competition for fans, indicates that the NFL teams are economic competitors, though not in the traditional sense. This view is supported by a number of cases where courts have held that the rules of a professional sports league violated § 1 of the Sherman Act. In reaching that conclusion, these courts necessarily found that the teams making up the league were engaged in economic competition. *Smith* v. *Pro Football, Inc., supra; Mackey* v. *National Football League, supra; Kapp* v. *National Football League, supra; Denver Rockets* v. *All-Pro Management, Inc.*, 325 F.Supp. 1049, 1056-57 (C.D.Cal.1971), *stay vacated sub nom., Haywood* v. *National Basketball Association*, 401 U.S. 1204, 91 S.Ct. 672, 28 L.Ed.2d 206 (1971) (Douglas, J., in chambers). *See Robertson* v. *National Basketball Association*, 389 F.Supp. 867, 893-96 & 67 F.R.D. 691, 694 n.3 (S.D.N.Y.1975); *Nassau Sports* v. *Hampson*, 355 F.Supp. 733 (D.Minn.1972); *Boston Professional Hockey Association, Inc.* v. *Cheevers*, 348 F.Supp. 261, 267 (D.Mass.), *remanded*, 472 F.2d 127 (1st Cir. 1972).[12]

B. ***Sherman Act § 1 Analysis***

Section 1 of the Sherman Act, 15 U.S.C. § 1, in relevant part provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ." While this language, read literally, could outlaw nearly every type of commercial understanding, the Supreme Court long ago held that only those agreements that impose an unreasonable restraint on competition are prohibited. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911).

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[12] Defendants cite *San Francisco Seals, Ltd.* v. *National Hockey League*, 379 F.Supp. 966 (C.D.Cal.1974), and *Levin* v. *National Basketball Association*, 385 F.Supp. 149 (S.D.N.Y.1974), in support of their argument that they are members of a joint venture, and are not economic competitors. Both cases, however, merely held that the actions complained of did not have any anticompetitive effect, and both courts noted that joint action by members of a professional sports league can have antitrust implications.

In evaluating whether a particular restraint is unreasonable and thus unlawful, courts have developed two complementary modes of analysis. On the one hand, there is the rule of reason. Under it, the competitive effect of a restraint is determined only after analyzing the facts peculiar to the business, the nature of the restraint and its effects, the history of the restraint, and the reasons why the restraint was imposed. *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238, 244, 38 S.Ct. 242, 62 L.Ed. 683 (1918). On the other hand, certain types of restraints are considered so plainly anticompetitive that they are deemed "illegal *per se.*" Under this mode of analysis, no elaborate study of the industry is made and the purported justifications for the restraint are not considered. *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

1. Per Se Illegality

The Coliseum challenges the validity of sections 3.1 and 4.3 of the NFL's Constitution and By-laws on the ground that these sections are *per se* illegal under § 1 of the Sherman Act. The *per se* rule is a judicial shortcut applied to those types of business agreements that the courts, after considerable experience, have found to be consistently unreasonable and therefore, plainly anticompetitive. As the Supreme Court stated in *Northern Pacific R. Co.* v. *United States:*

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

356 U.S. at 5, 78 S.Ct. at 518.

One type of agreement courts have found to be so pernicious as to be illegal *per se* is "an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." *United States* v. *Topco Associates, Inc.,* 405 U.S. 596, 608, 92 S.Ct. 1126, 1133,

31 L.Ed.2d 515 (1972). In *Topco*, the Supreme Court struck down an agreement between operators of independent supermarket chains to allocate territories. Professor Sullivan succinctly summarized the facts in *Topco:*

> [The independent operators'] stores competed with other grocery stores, including those of the large national and regional chains. Those large chains sold nationally advertised products and also utilized so called "house brands" which they had packed for them with their own trade names and marks. None of the independent operators was large enough, alone, to have a house brand, so they all formed a subsidiary which adopted the Topco brand and mark. This subsidiary purchased products bearing this brand label from packers, much as the large chain grocers did, and distributed these name brand products to the participating independents. The arrangement also included provisions to protect the territories of the participating independents from one another.

L. Sullivan, *Antitrust* 216, 217 (1977).[13]

Sections 3.1 and 4.3 limit the ability of transfer and expansion teams freely to select their home cities. The Coliseum contends that these sections therefore constitute an illegal allocation of territories under *Topco.*[14] Although the sections

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[13] The district court applied the rule of reason to Topco's practices and held that they were procompetitive and thus reasonable because they promoted competition between the independents and the large chains. The Supreme Court rejected this finding, not because the Court questioned its validity, but because it found that the defendants had engaged in a clear allocation of territories and that therefore a *per se* violation of § 1 existed. As the Court put it, the inability of courts "to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules." 405 U.S. at 609-10, 92 S.Ct. at 1134.

[14] Another practice that is proscribed by the *per se* rule is the group boycott. *E.g., Silver* v. *New York Stock Exchange,* 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963). A group boycott "is a concerted attempt by a

(footnote continues)

may be characterized as agreements to allocate territories, the court believes that it would be inappropriate in the circumstances of this case to apply *Topco's per se* rule.

The reason why this case differs from *Topco* is that the economic competitors here must act concertedly—i.e., they must cooperate to some extent for competition to take place at all. If the teams did not cooperate, a professional football league such as the NFL would not exist and economic competition among the teams would then not occur.[15] For example, as discussed earlier, the teams must cooperate to the extent of agreeing on playing rules and playing schedules, or no games would be played and no league would exist.

Moreover, sections 3.1 and 4.3, the very sections challenged here, appear, on their face, to promote competition to some degree. The reason for this observation is as follows: In order for professional football games to be played (and thus for economic competition to exist), the teams must not only agree

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(footnote continued)

group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level." *Smith* v. *Pro Football, Inc.*, slip opinion at 24 of 193 U.S.App.D.C., at 1178 of 593 F.2d (footnote omitted).

With respect to section 3.1 of the NFL's Constitution and By-laws, which requires a three-fourths vote before a new member may be admitted into the NFL, an argument could be made that not only is it an agreement to allocate territories, but that it is also, in part, a group boycott. If one were to argue that section 3.1 is *per se* illegal insofar as it requires a three-fourths vote before *any* new team may be admitted into the NFL, then one would be contending, under the definition of a "group boycott" set forth above, that section 3.1 is an illegal group boycott of new teams. But since the Coliseum is contending only that section 3.1 is an illegal allocation of territories, its argument must only be that section 3.1 is *per se* illegal insofar as it requires a three-fourths vote to determine the *location* of an expansion team.

[15] Theoretically, without an organized league, professional football teams could still independently arrange to play exhibitions against one another and thus could continue to compete in the economic arena for players and fans. But the history of professional sports in this country indicates that professional teams, with rare exceptions (such as the Harlem Globetrotters), exist only in the context of a league structure.

on *how* the games are to be played, by adopting playing rules, and *who* the participating teams are to be, by adopting playing schedules, but also must agree on *where* the games are to be played. Games, traditionally, are played where one of the participating teams has its home city. Therefore, an agreement on where the games are to be played necessarily involves an agreement on the location of each team's home city. Sections 3.1 and 4.3 provide a mechanism whereby the NFL teams can agree on where each transfer or expansion team is to be located—to that extent these sections are agreements on where games are to be played. Because some sort of agreement is needed to determine where each team is to have its home city, however, this does not necessarily mean that it is reasonable and thus legal for the agreement to contain a three-fourths vote requirement, as provided in sections 3.1 and 4.3. In fact, it may be that the only type of agreement that is reasonable is one whereby the teams agree that an existing or a new team may play its home games in whichever city it selects. But this does not detract from the fact that an agreement regarding the location of teams, whatever its terms, does to some extent promote competition by determining where games are to be played, thereby making it possible for the sports events to take place.

Thus, sections 3.1 and 4.3 cannot be deemed *per se* illegal under the standards set forth in *Northern Pacific R. Co.* Because these agreements promote competition to some extent, it cannot be said that they have a "pernicious effect on competition" or that they lack "any redeeming virtue." *Northern Pacific R. Co.*, 356 U.S. at 5, 78 S.Ct. at 518. Wooden application of the *per se* rule in this context would risk outlawing provisions that may be reasonable and thus lawful.

Other courts, when faced with ruling on the antitrust implications of the NFL's cooperative agreements, have concluded that it would be inappropriate to apply the *per se* standard. *Smith* v. *Pro Football, Inc., supra; Mackey* v. *National Football League, supra; Kapp* v. *National Football League, supra. But see Bowman* v. *National Football League,* 402 F.Supp. 754 (D.Minn.1975).

It follows, therefore, that the legality of sections 3.1 and 4.3 must be tested under the rule of reason.

2. Rule of Reason

Under the rule of reason, the court must balance the anticompetitive evils of the challenged restraints against their procompetitive virtues to determine whether the restraints are reasonable and thus legal. As stated by the Supreme Court in *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918): "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." In examining the challenged restraints, the court must look to both their purpose and effect. L. Sullivan, *Antitrust* § 71 (1977). The court may not, however, consider virtues possessed by the restraints that are not procompetitive in nature. *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). According to *Professional Engineers:*

> [T]he purpose of [antitrust] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

Id. at 692, 98 S.Ct. at 1365.[16]

The Coliseum argues that if its *per se* analysis is not accepted, the court nevertheless should at this time invalidate sections 3.1 and 4.3 under the rule of reason. The Coliseum contends that the challenged sections are anticompetitive in that

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[16] In *Professional Engineers,* the Court considered the legality of a canon of ethics promulgated by the National Society of Professional Engineers that prohibited the member engineers from engaging in competitive bidding. The Society justified the restraint as being in the public interest because price competition assertedly would result in inferior engineering work which in turn would endanger the public safety. The Court held that this was not a procompetitive justification and therefore was irrelevant to the reasonableness analysis. It thus affirmed the court of appeals' ruling striking down the canon.

they assertedly insulate the Rams from competition—with respect to gate receipts, other revenues, and players—that would exist if another NFL team were playing in the Coliseum. The Coliseum further contends that the justifications offered in support of sections 3.1 and 4.3 represent, on their face, nothing more than a desire on the part of the NFL teams to maximize profits. Though profit maximization is certainly in the best interests of the football industry, it is not, by itself, a procompetitive justification and, under *Professional Engineers,* may not be factored into the reasonableness determination. The Coliseum concludes therefore, that since there is nothing on the procompetitive side of the scale to balance out the anticompetitive effect of the sections, they are unreasonable and illegal under § 1 of the Sherman Act.

The NFL and its member teams argue that they have a lawful and important interest in the location of each of the teams. This interest assertedly arises because the teams share gate receipts and television revenues, because of problems involving travel costs, and because of problems involving the geographic alignment of the NFL. At this stage of the case, the record on how these items translate into procompetitive justifications has not been developed.

At the heart of the Coliseum's argument is its assertion that, on their face, the justifications offered for sections 3.1 and 4.3 are not procompetitive. But the Coliseum is incorrect because, as stated above, these sections on their face do have a procompetitive aspect.

A final determination of whether sections 3.1 and 4.3 are illegal under the rule of reason cannot be made at this stage of the litigation. Aside from the fact that the Coliseum has not properly alleged standing, the record is devoid of evidence necessary to make this determination. Further evidence needs to be submitted concerning the business of professional football, the nature of the restraints and their effects, their history, and the reasons why they were imposed.

The court, of course, intimates no opinion on whether the challenged sections of the NFL's Constitution and By-laws are unreasonable restraints of trade under § 1 of the Sherman Act.

CONCLUSION

The motions to dismiss the Coliseum's complaint are granted with leave to amend within thirty days to enable the Coliseum adequately to allege standing.

The motion for partial summary judgment filed by the Coliseum is denied. Final determination cannot be made of the Coliseum's claim under § 1 of the Sherman Act until standing is properly alleged. In addition, though the NFL teams are economic competitors, for the reasons set forth above it is inappropriate to apply the *per se* analysis to the challenged sections of the NFL's Constitution and By-laws. Application of the rule of reason must be postponed until the record has been fully developed.

THEREFORE, IT IS SO ORDERED.

APPENDIX E

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 78-3523-HP

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,
An Unincorporated Association, et al.,
Defendants.

OAKLAND RAIDERS, LTD.,
Cross-Claimant,

v.

NATIONAL FOOTBALL LEAGUE,
An Unincorporated Association, et al.,
Cross-Defendants.

FINAL DECREE

The liability and fact-of-damage issues have been tried. The jury has returned its verdicts in favor of the plaintiff and cross-claimant. The Court finds that the plaintiff and the cross-claimant are entitled to an injunction pursuant to § 16 of the Clayton Act (15 U.S.C. § 2) [sic].

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. By applying Rule 4.3 to prevent the Oakland Raiders from transferring the location of its NFL franchise to the Los Angeles Memorial Coliseum, defendants have agreed to unreasonably restrain and, in furtherance of said agreement, have

unreasonably restrained trade and commerce in violation of § 1 of the Sherman Act;

2. The NFL and its member clubs are hereby permanently enjoined from interfering with, preventing or impeding transfer of the Oakland Raiders' NFL franchise from the City of Oakland to the Los Angeles Memorial Coliseum.

3. The officers, agents, servants, employees and attorneys of each defendant, and all persons in active concert or participation with them, or any of them, are permanently enjoined from doing any act that defendants are hereinabove enjoined from doing.

4. The Court hereby determines that there is no just reason for delay in entering this final judgment on plaintiff's and cross-claimant's claim for declaratory and equitable relief, and the Court expressly directs that this final judgment be entered.

5. It is hereby FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff and cross-claimant each shall have and recover its costs of suit, including a reasonable attorneys' fee, the amount thereof to be fixed by the Court hereafter at such time as the Court shall determine.

6. Jurisdiction is retained for the purposes of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, or for the enforcement of compliance thereof, and punishment of violations thereof, and to determine the damages recoverable by plaintiff and cross-claimant against defendants.

Dated: June 14, 1982.

HARRY PREGERSON

UNITED STATES CIRCUIT JUDGE
Sitting by Designation

APPENDIX F

APPENDIX F

United States Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 82-5572, 82-5573, 82-5574, 82-5664
82-5665, 83-5714, 83-5732, 83-5938

LOS ANGELES MEMORIAL COLISEUM COMMISSION, *et al.*,
Plaintiff/Appellee,

v.

NATIONAL FOOTBALL LEAGUE, etc., *et al.*,
Defendants/Cross-Defendants/Appellants,

v.

OAKLAND RAIDERS, LTD.,
Cross-Claimant/Appellee.

Before:

ANDERSON and NELSON,
Circuit Judges,

and S. WILLIAMS,
*District Judge**

ORDER

Judges Anderson and Nelson vote to deny panel rehearing. Judge Williams would grant panel rehearing. The panel has voted to reject the suggestion for rehearing *en banc.*

---

* The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the suggestion for *en banc* rehearing, and no judge of the court has requested a vote on the suggestion for rehearing *en banc.* Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing *en banc* is rejected.

APPENDIX G

APPENDIX G

STATUTES INVOLVED

SHERMAN ACT

15 U.S.C. § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

FOOTBALL LEAGUE CONSOLIDATION ACT

P.L. 89-800 (1966), 15 U.S.C. § 1291:

The antitrust laws . . . shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income tax under section 501(c)(6) of Title 26, combine their operations in an expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.

No. 84-406
84-418

Office Supreme Court, U.S.
FILED
OCT 12 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

NATIONAL FOOTBALL LEAGUE, et al.,
Petitioner,
v.
OAKLAND RAIDERS, LTD., & LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

OAKLAND-ALAMEDA COUNTY COLISEUM COMMISSION, INC.
Petitioner,
v.
OAKLAND RAIDERS, LTD., & LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

On Appeal From The United States Court Of Appeals, For The Ninth Circuit

BRIEF OF PUBLIC ENTITIES AS AMICI CURIAE IN SUPPORT OF GRANTING WRIT OF CERTIORARI

Filed On Behalf of City of San Diego, California; the City of Atlanta and Fulton County Recreation Authority, a public corporation of the State of Georgia; the City of Buffalo, New York; the County of Erie, New York; the County of Alameda, California; the City of Oakland, California; the City of Irving, Texas; the City of New Orleans, Louisiana; the City of Pittsburgh, Pennsylvania; Ramsey County, Minnesota; Tampa Sports Authority, a body corporate and politic of the State of Florida; the City of Green Bay, a Wisconsin municipal corporation; King County, Washington.

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INTEREST OF AMICI CURIAE

Amici represent municipal governments, county governments, public entities and public corporations that own or subsidize sports stadiums which provide public facilities for NFL member clubs and other professional and local sports teams. Pursuant to Rule 36(4), the consent of the parties is not required to file this Brief, since *Amici* are political subdivisions of their states.

The factual history of this litigation may be found in ample detail in Petitioners' briefs and therefore will not be repeated here.

Amici wish to assist the Court in identifying and understanding the relationship between professional sports leagues and the communities in which their teams operate and how that relationship should affect the resolution of the antitrust issues raised in this action.

The antitrust issues presented to this Court are of enormous importance both in an economic and noneconomic sense to public entities and taxpayers across the United States. These issues directly affect the manner in which public authorities may deal with professional sports leagues, the degree to which public authorities may rely upon decisions and commitments of such leagues, and the pertinence of public interest considerations in a Sherman Act analysis of league decisions on the location of existing league teams.

The undisputed reality is that public entities and their taxpayers support professional sports leagues by public subsidy. Huge sports facilities are built by the public with borrowed money to be repaid in part by revenues generated from the continued operations of the sports leagues in the community.

The City of Oakland put itself on the map by its then thought farsighted investment in the business of professional football and by the subsequently unequalled fan support. Obviously, the City of Oakland, along with *Amici*, in making their investment decisions relied and still rely heavily on a sports league's ability to control the location of its teams. Community leaders would be subject to recall were they to promote public investment in barnstorming sports teams. From a business standpoint, the NFL would be foolish to ignore the public's contribution to its success by allowing willy-nilly relocations.

League rules that promote and ensure franchise location stability are critical to the public's decision to make these major investments. Such investment would seldom, if ever, be made in the absence of league rules and commitments that provide a reasonable assurance of continued team operations in a community.

Investment by public entities in community sports and entertainment facilities promotes competition among different sports, as well as among sports and other entertainment. The decisions of the courts below discourage future investment by public authorities in such facilities and put existing investments at serious risk.

In addition to these adverse financial consequences and their concomitant impairment to competition, the courts below failed to give due consideration to the equally important "investment" of community spirit and pride in local sports teams which lies at the heart of the league's commitment to the communities.

Antitrust laws never were intended to frustrate or undermine the public interest or consumer interests. Just the opposite was intended. Nevertheless, as applied and interpreted in the courts below, the antitrust laws have been turned against the public and the consumer in the City of Oakland and adjoining communities. *Amici* fear the same use of the Sherman Act against them.[1]

The courts below were misguided in focusing on the sports competition among the NFL teams that occurs on the football field while overlooking the economic competition among different sports and between sports and other entertainment. In so interpreting the antitrust laws, the courts will render meaningless the NFL's commitments to *Amici* and to other communities that support local teams. The decisions of the courts also will discourage public investment in sports facilities because of the inability to obtain adequate assurance of a continuing relationship between the sports franchises and the communities.

Amici urge the Court to recognize not only the existence of these competitive and public interest considerations, but their clear relevance to an

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[1] Indeed, the City of Baltimore has already lost the Baltimore Colts and now is involved in protracted, expensive litigation over the legality of that unilateral move made in the wake of the court of appeals' decision in this case.

evaluation of sports league agreements concerning team location under Section 1 of the Sherman Act.

SUMMARY OF ARGUMENT

Amici urge that important questions of federal law are presented in this case and that a proper analysis of these questions will lead this court to conclude:

First, from its precedent, that the NFL's franchise location rule, which promotes competition and investment and protects the public interest, cannot as a matter of law violate Section 1 of the Sherman Act.

Second, assuming the application of Section 1 to such league rules, that public interest factors and the public service aspects of a business are entitled to consideration in a rule of reason analysis of professional sports leagues' location rules.

ARGUMENT

I

THE APPLICATION OF SECTION 1 OF THE SHERMAN ACT TO THE NFL'S LOCATION RULE PRESENTS IMPORTANT QUESTIONS FOR THIS COURT'S REVIEW

Amici, the City of Oakland, the County of Alameda and other communities relied on league control of franchise locations prior to making huge investments in public facilities. Those communities sought a *league* franchise to bring *league* sports to its citizens. The communities did not deal with the separate member clubs when bringing professional sports to town. The member clubs had no authority to do so -- that was a *league* decision.

The communities recognized the reality ignored by the Ninth Circuit in its misguided antitrust analysis. Professional sports leagues deal in one product -- league play. Only the league can produce that product and bring it to a community. As a matter of law, the league members cannot be treated as independent economic competitors under Section 1 of the

Sherman Act with respect to decisions on the location of league franchises.

In reaching the result below, the lower courts relied heavily on the so-called "intraenterprise conspiracy" cases, which were repudiated by this Court in *Copperweld Corp. v. Independence Tube Corp.*, 81 L.Ed.2d 628, 104 S.Ct. 2731 (June 19, 1984).[2] In applying the intraenterprise conspiracy doctrine to the NFL, the lower courts improperly elevated form over economic substance and distorted antitrust analysis in a manner that served neither consumer interests nor any other policy underlying the antitrust laws.[3]

The courts below gave unnecessary emphasis to the fact that the NFL clubs were "all independently owned." *Los Angeles Memorial Coliseum v. N.F.L., supra*, 726 F.2d at 1389-1390. As such, both lower courts viewed the NFL as merely an "association" of 28 "independent business entities" subject to the conspiracy provisions of Section 1 of the Sherman Act. *Id.* at 1388, 1390. In reaching this conclusion, the courts below relied upon decisions that no longer accurately state the law. In *Copperweld*, this Court undertook a detailed analysis of each of the intraenterprise conspiracy cases and disapproved their holdings and reasoning, stating that "[t]o the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled." *Copperweld Corp. v. Independence Tube Corp., supra*, 81 L.Ed.2d at 647, 104 S.Ct. at 2745.

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[2] In its initial holding, the district court relied upon all four principal intraenterprise conspiracy cases: *United States v. Yellow Cab Co.*, 332 U.S. 218, 91 L.Ed. 2010 (1947), *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 95 L.Ed. 219 (1951), *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 95 L.Ed. 1199 (1951), and *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 20 L.Ed.2d 982 (1968). *Los Angeles Memorial, etc. v. Nat. Football League*, 519 F.Supp. 581, 582 (C.D. Cal. 1981), *aff'd* 726 F.2d 1381 (9th Cir. 1984). In affirming, the court of appeals both approved the district court's reliance on these cases and specifically cited *Timken* and *Perma Life*. *Los Angeles Memorial Coliseum Com'n v. N.F.L.*, 726 F.2d 1381, 1388 (9th Cir. 1984).

[3] Both lower courts also labored under the misapprehension that a holding that the NFL did not violate the antitrust laws in this case would necessarily "make the League incapable of violating Sherman Act § 1" and "immunize the NFL from § 1 scrutiny." *Los Angeles Memorial Coliseum v. N.F.L., supra*, 726 F.2d at 1387-1388. *Amici* do not believe either Petitioner to be urging such a position in this Court. Further, as Judge Williams aptly noted, sports leagues will remain subject to the full scope of the antitrust laws if the decisions of the lower courts are reversed. *Id.* at 1409 (dissenting opinion).

In *Copperweld*, this Court recognized that mere organizational structure alone is not sufficient to invoke Section 1 scrutiny, and that separate incorporation may be without antitrust significance and also serve numerous other valid goals. *Copperweld Corp. v. Independence Tube Corp., supra*, 81 L.Ed.2d at 643-647, 104 S.Ct. at 2740-2743. *See also*, Areeda, *Intraenterprise Conspiracy in Decline*, 97 Harv. L. Rev. 451 (1983). Antitrust courts are properly concerned with coordinated activity that "suddenly bring[s] together economic power that was previously pursuing divergent goals." *Copperweld Corp. v. Independence Tube Corp., supra*, 81 L.Ed.2d at 642, 104 S.Ct. at 2741. That is not the case here. In the context of a sports league, the coordinated activity "result[s] from an effort to compete [rather than] from an effort to stifle competition." *See, Copperweld Corp. v. Independence Tube Corp., supra*, 81 L.Ed.2d at 642, 104 S.Ct. at 2741. In a league context, the "coordination" is "necessary if a business enterprise is to compete effectively." *Id.*

Although the court of appeals found that the NFL clubs "are not true competitors" [*Los Angeles Memorial Coliseum v. N.F.L., supra*, 726 F.2d at 1391], that they share their revenues extensively [*id.* at 1390], that the NFL has both horizontal and vertical attributes [*id.* at 1391], that "the agreement creating the NFL is valid and the territorial divisions therein are ancillary to its main purpose" [*id.* at 1395] and that the location agreement furthers significant league interests [*id.* at 1396], the court nevertheless failed completely to appreciate the significance of those findings. Instead, it took shelter in the intraenterprise conspiracy cases, holding "that existing precedent [cannot] be ignored. . . ." *Id.* at 1390, n. 4. This reliance on a formalistic analysis of cases so recently disapproved by this Court should, without more, warrant review of the decision below.

In *Amici's* view, the proper treatment of a sports league location decision under Section 1 of the Sherman Act is found in *San Francisco Seals, Ltd. v. National Hockey League*, 379 F.Supp. 966 (C.D. Cal. 1974), which posed an equivalent antitrust issue. In that case, the NHL's Board of Governors refused to permit an NHL club to relocate from San Francisco to Vancouver -- an area where no other league team was operating. In holding as a matter of law that the NHL's conduct did not violate the Sherman Act, the court reasoned:

> "Within the relevant market in which we are here concerned, plaintiff and defendants are not competitors in the economic sense. It is of course true that the member

> teams compete among themselves athletically for championship honors, and they may even compete economically, to a greater or lesser degree, in some other market not relevant to our present inquiry. But, they are not competitors in the economic sense in [the market for the production of professional hockey]. They are, in fact, all members of a single unit competing as such with other similar professional leagues. *Consequently, the organizational scheme* of the National Hockey League, by which all its members are bound, *imposes no restraint upon trade or commerce in this relevant market, but rather makes possible a segment of commercial activity which could hardly exist without it.*" *Id.* at 969-70 (emphasis supplied).[4]

League undertakings in connection with stadium construction demonstrate how unrealistic it is to view members of a sports league as business competitors with respect to team location matters. One illustration is the commitment of the NFL not to approve any geographical relocation of a league member for the full 30-year term of a use agreement between that club and a public authority -- a commitment made to satisfy Minnesota state statutory prerequisites for the public construction of a new stadium. *See, Minnesota Vikings Football Club v. Metropolitan Council*, 289 N.W.2d 426, 444 (Minn. 1979). *See also, Lifteau v. Metropolitan Sports Facilities Comm'n*, 270 N.W.2d 749, ____ (Minn. 1979). True business competitors simply do not undertake commitments that directly benefit their competitors by facilitating the construction of the competitors' new operating facilities and assuring their long-term viability.

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[4] A sports law textbook confirms the propriety of this analysis:

> "[T]he realities of the major sports leagues' operations would seem to lend support to the conclusion reached in San Francisco Seals. The primary goal of Section 1 of the Sherman Act is to insure that true economic competitors maintain a healthy distance from one another. The section was not intended to condemn all cooperative efforts in the business world. If a particular group of entrepreneurs are joint investors in a common venture which could not be carried on by any one of them alone, the cooperation which results hardly seems improper. In these instances, it is propr that the 'agreements' in question are viewed as essentially internal marketing decisions." Weistart & Lowell, *The Law of Sports*, § 5.11 at 701 (footnote omitted).

Amici submit that a realistic assessment of the operations of professional sports leagues leads inevitably to the conclusion that a league is not a collection of ordinary business competitors of the same character as the members of a trade association. Teams in a professional sports league have no valid business interest in driving each other out of business or in maximizing their profits at each other's expense or at the expense of communities that have invested in facilities on their behalf. Rather, as Justice Rehnquist observed in speaking of the National Football League itself:

> "The NFL owners are joint venturers who produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market. Although individual NFL teams compete with one another on the playing field, they rarely compete in the market place. . . . This arrangement . . . is largely a matter of necessity." *National Football League v. North American Soccer League*, 459 U.S. 1074, 1077, 74 L.Ed.2d 639 (1982) (Rehnquist, J., dissenting from denial of certiorari).

II

THE RELEVANCE OF PUBLIC INTEREST FACTORS TO A RULE OF REASON ANALYSIS OF THE LEGALITY OF PROFESSIONAL SPORTS LEAGUE LOCATION AGREEMENTS MERITS REVIEW BY THIS COURT

The decisions below declined to require a recognition that public interest factors and the public service aspects of certain businesses (*e.g.*, professional sports leagues and teams) have public service aspects that require special consideration under antitrust laws. The trial court refused to instruct the jury that it should weigh these public interest considerations when assessing the reasonableness of the location agreement under the antitrust laws. *See, Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787, n. 17, 44 L.Ed.2d 572 (1975); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696, 55 L.Ed.2d 637 (1978); *Boddiker v. Arizona State Dental Ass'n*, 549 F.2d 626, 632 (9th Cir.) *cert. denied*, 434 U.S. 825 (1977).

The Court of Appeals' unfortunate interpretation of antitrust doctrine has produced merely one ripple in an ever-widening stream of litigation, which already has had unsettling effects on relations between public authorities and the professional sports industry. A national newspaper recently editorialized about these effects:

> "Cities, expecting to create millions in new income, give their names to teams. Fans give their hearts. Sadly, they sometimes get little in return. An Owner who doesn't get what he wants from a town now can take the franchise to another city, leaving behind an expensive, empty stadium and fans with broken hearts. . . .
>
> "If this business of musical franchises continues without interference from Congress or the courts, it can only damage the health of professional sports. Each time an Owner is able to thumb his nose at a league or at a city, the stability of the sports industry is threatened. And when loving fans, robbed of their team, stop hating, they will stop caring about the game. Then the game will be over." *USA Today*, April ____, 1984 at ____.

Public authorities, like the public generally, have long looked to professional sports leagues for the responsible administration of their business as the NFL, bringing its product to Oakland each Sunday, became part of the community fabric in the sense of economics, civic loyalty and togetherness.

Publicly owned facilities for the presentation of professional sports league games are commonplace throughout the United States. The construction, financing and operation of these publicly owned stadiums has long been viewed as a proper governmental function. *See, Martin v. Philadelphia*, 420 Pa. 14, 18-19, 215 A.2d 894, 896 (1966); *New Jersey Sports & Exposition Authority v. McCrane*, 61 N.J. 1, 15-16, 292 A.2d 545, 552 (N.J. 1971) *appeal dismissed*, 409 U.S. 843 (1972); *City of Oakland v. Oakland Raiders*, 32 Cal.3d 60, 70-71, 183 Cal.Rptr. 673, 646 P.2d 835 (1982).

That governmental interests are at the core of disputes of the present type is underscored by both the City of Oakland's eminent domain suit

against the Raiders[5] and the suit brought by the Los Angeles Coliseum, a Respondent in this action, against the City of Oakland to enjoin prosecution of that eminent domain suit on Clayton Act grounds.[6]

The decision of Petitioner NFL to maintain the Raiders' operations in Oakland was motivated by the belief that such a decision served league interests. But in making that decision, the NFL also served the interests of Oakland consumers and taxpayers by respecting the investments they had made on behalf of the NFL and the Raiders, the substantial contributions that the Raiders' franchise made to the social and economic well-being of the Oakland area, and the extraordinary fan and community support that the Raiders' franchise received during its two decades in Oakland.

Agreements that promote the public interest and further an entity's public service obligations should not be evaluated under the strict standards designed to ensure that true competitors maintain a "healthy distance from one another." (Weistart and Lowell, *The Law of Sports, supra*, at 701.) *See, Goldfarb v. Virginia State Bar, supra*, 421 U.S. at 787, n. 17.

Even if the courts below properly limited their consideration to the intraleague competitive effects of the NFL location rule, they ignored the fact that league policies favoring franchise stability have substantial procompetitive effects in their own right. By demonstrating a sports league's willingness to respect community investments made on a team's (and, therefore, on a league's) behalf, league rules governing franchise location promote competition by facilitating the construction of stadiums, arenas and other related facilities -- construction which is without question a procompetitive factor. Stadium construction facilitates the entry of sports teams into the marketplace by eliminating barriers to entry that exist when there are no facilities. Such construction thus enhances consumer welfare by permitting fans greater freedom of choice and by promoting competition between sports and other forms of entertainment. And, by improving the quality of playing facilities, stadium construction encourages expansion of sports leagues and makes league sports a more effective competitor in the larger market for entertainment products.

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[5] *See, City of Oakland v. Oakland Raiders, supra*, 32 Cal.3d 60.

[6] *Los Angeles Mem. Coliseum Com'n. v. City of Oakland*, 717 F.2d 470 (9th Cir. 1983).

CONCLUSION

Amici urge the Court, in the public interest, to grant certiorari.

Respectfully submitted,

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Counsel of Record

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No. 84-406

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

NATIONAL FOOTBALL LEAGUE, et al.,
Petitioners,

VS.

OAKLAND RAIDERS, LTD., and
LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

Brief of Respondent Los Angeles Raiders (formerly "Oakland Raiders") In Opposition to Petition of National Football League For Writ of Certiorari

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QUESTION PRESENTED

Are not any peculiarities or individualities of professional football adequately cared for by the Rule of Reason? Or must a new antitrust doctrine—of unknown content—be created, 94 years after enactment of the Sherman Act? And, if so, is that not the task of Congress?

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Brief of Respondent Los Angeles Raiders (formerly "Oakland Raiders") In Opposition to Petition of National Football League For Writ of Certiorari

THE PETITION ITSELF PRESENTS NO QUESTION

We state a "question" on page i because the petition itself presents no question. To be sure, there is a single "Question Presented" stated thus:

> "Whether adherence by the members of a professional sports league to the league agreement designating the locations in which each member will conduct league operations constitutes a conspiracy among business competitors condemned by Section 1 of the Sherman Act."

But that sums up to nothing more than asking whether there should not be a reversal of the judgment that petitioners, the defendants (hereafter "NFL"), violated Sherman Act, Section 1. This hardly serves the purpose of Rule 21.1(a). *Seaboard Air Line R. Co. v. Watson*, 287 U.S. 86, 91 (1932); *General Talk. Pictures Corp. v. Western El. Co.*, 304 U.S. 175, 177-8 (1938).

It is elementary that whether conduct is a "conspiracy . . . condemned by Section 1 of the Sherman Act" is comprised of three elements:

(1) Concerted action of two or more,[1]

(2) Constituting a restraint of trade,

(3) Which is unreasonable.

The petition's question does not tell whether what petitioners contest is the presence of "concerted action", or that the concert was in restraint of trade, or that the restraint was unreasonable.

The petition's avoidance of pinpointing any questions about the law reveals that what NFL seeks is what *only*

All emphasis in quotations in this brief is added unless otherwise noted.

[1]It is of course irrelevant whether the concerted action be called a "conspiracy", an "agreement", a "contract", or a "combination".

Congress can grant, an exemption of professional football, in whole or in part, from the reach of the Sherman Act. It sought and was denied that exemption in 1958, in 1964, and in 1965. In 1961, National Football League gained some exemption from the Sherman Act with respect to joint telecasting of games (75 Stat. 732, 15 U.S.C. §§ 1291, 1292). In 1966, it obtained exemption for the mere fact of merger of sports leagues (intended for a merger of the American Football League and National Football League) (15 U.S.C. § 1291). Ever since the present action was commenced, NFL has been asking Congress for further exemption from the Sherman Act, in the very respects involved in this case, already denied in 1958, 1964, and 1965. See pp. 25, 26, *infra.*) Being unsuccessful in its requests to Congress, NFL now seeks the exemption from this Court in the guise of judicial clarification of what needs no clarification.

STATEMENT OF BASIC FACTS

A brief summary of basic facts will place the case in context.[2] A jury having spoken, conflicts and disputed inferences have been resolved against petitioners.

Twenty-eight separate football clubs, some corporations, some partnerships, some individual ownerships, each in business to make a profit for itself, entered into an agreement to play football among themselves. The agreement is the NFL Constitution and Bylaws (Ex. 38). The apparatus by which the arrangement is administered is called "The National Football League", described in the title to the Constitution as an "unincorporated association". It is nothing more than the expression for the contractual interrelationship of the member clubs. The purpose of the association was not to forward any business of NFL's, for NFL

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[2]All facts stated appear in the opinion of the Court of Appeals except for amplifying detail, for which other record reference is given.

has none, but, as is stated in Constitution Article II, Rule 2.1,

> "[t]he purpose and objects for which the League is organized are:
>
> "(a) To promote and foster the *primary business of League members, each member being an owner of a professional football club* located in the United States.
>
> * * *
>
> "2.2 The League is not organized nor to be operated for profit." (Pet., p. 12a)

From the beginning, the agreement contained provisions to *preserve the monopoly of each member* in its own area, to give each "territorial exclusivity" by assigning *ownership* of a territory to each club, to protect each from competition of any other. Article IV, in which the relevant rules appear, is labeled "Territorial Rights". Rule 4.3 provided that no member may transfer to "a location within the home territory of any other club" without approval by "unanimous vote". The rule was adopted when NFL thought that football was immune from the Sherman Act. When this Court held otherwise (*Radovich v. National Football League*, 352 U.S. 445 (1957)),[3] NFL unsuccessfully asked Congress to legalize that very rule. Mr. Bert Bell, Mr. Rozelle's predecessor as NFL Commissioner, told Congress in 1958 that the purpose of the rule was to protect each club from competition, from "territorial invasion".[4] Con-

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[3]In *NCAA v. Board of Regents of Univ. of Okla.*, ... U.S. ..., 82 L.Ed.2d 70, 104 S.Ct. 2948 (1984), it was held that even collegiate football—free of the total commercialism of professional football—is answerable to the law.

[4]Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 85th Congress, Second Session, on Organized Professional Team Sports, July 1958, at pp. 392-99.

NFL's Commissioner, Rozelle, admitted from the witness stand that Rule 4.3 was adopted to protect each club from competition (Tr.2d 2321, 2323, 2375).

gress refused to grant the exemption. NFL sought it again in 1964 and again in 1965, and was again refused (see discussion at pp. 24, 25 below).

Nevertheless, NFL stubbornly kept the rule. For example, following the merger agreement between NFL and AFL in 1966 and before its consummation in 1970, AFL's counsel vainly urged that the territorial rule, now Rule 4.3, be dropped as plainly illegal under the Sherman Act (Tr.2d 4467, 2772-74). And Davis, AFL Commissioner before the merger agreement, and later the General Partner of the Raiders, concurred in the objection. NFL's counsel advised that the "exclusive territory provision was inherently vulnerable to antitrust challenge" (Tr.2d 2797-98). As a condition of agreeing to the merger, NFL even insisted on payment by the clubs of the American Football League of $8 million to go to the San Francisco *Forty-Niners* as compensation for invasion of the Forty-Niners' territory by the Raiders, and of $10 million to go to the New York *Giants* for invasion of the Giants' territory by the Jets (Tr.2d 2329-30).

The purpose of Rule 4.3 has never changed. A vast amount of evidence was placed before the jury to show that the original purpose—to shield each club from competition —has remained the same (*e.g.*, Tr.2d 2805, 7052). By its verdict in favor of plaintiff and Raiders the jury so found.

In 1978 the Los Angeles Rams announced that in 1980 it would quit Los Angeles and move to Anaheim. Seeking a team to fill the vacancy, plaintiff Los Angeles Memorial Coliseum Commission, owner and operator of the Los Angeles Coliseum where the *Rams* had played its home games, filed this suit. Thereupon Mr. Rozelle, NFL's commissioner, and Mr. Carothers, its counsel, called a meeting of the member clubs to tell them that Rule 4.3 was indefensible under the Sherman Act, "clearly illegal", that so long as it remained there was "no defense" to the lawsuit, but that, in hope of "negating" the lawsuit, the rule should

be amended to change the vote required for permission to transfer a club's location from unanimity to three-quarters. Even that amendment, they said, was of dubious legality, but it might get by as less offensive than the then rule (Tr. 2d 4557-58, 2424; Ex. 191). The amendment also extended the rule to any relocation. The amendment was declared adopted. At the same meeting, the *Rams* asked approval of its relocation from Los Angeles to Aanaheim, and approval was cursorily voted, without inquiry, without investigation, without study.

The term of Raiders' license or lease to use the Oakland Coliseum ended December 31, 1979. Raiders believed that with the demand for astronomical player salaries and other costs foreseen for the 80's, a stadium, both small and out-of-date, like the Oakland Coliseum, would not permit Raiders to generate revenues sufficient to enable it to be competitive with the other clubs of the league. Negotiations to obtain renewal on acceptable terms with long overdue modernization of the stadium reached agreement (Tr.2d 4865-70) but then collapsed when Oakland was assured by NFL that it would not let the Raiders move. Oakland, thus assured that Raiders had no bargaining power, reneged on the agreement (Tr.2d 4877, 4879-83).[5]

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[5]The eminent domain suit then brought by the City of Oakland to condemn the Raiders is referred to in the opinion of the Court of Appeals and in the petition at p. 10. After the opinion of the Court of Appeals, a judgment in the eminent domain suit in favor of Raiders and against the City was re-entered, after trial, on August 10, 1984. The petition states that the City has filed a petition for writ of mandate (mandamus) to review that judgment and application for injunctive relief, and that it is pending in the California Supreme Court. But that petition was *denied* on September 27, 1984.

The evidence in the eminent domain case on the subject of Oakland's reneging and the evidence on the subject in this case are essentially the same. The express findings in that case show

Raiders then arranged to move to Los Angeles. Thereupon NFL, resorting to Rule 4.3, voted that the Raiders could not move. NFL refused to schedule Raiders' home games in Los Angeles, and it obtained an interlocutory injunction in a California state court in Oakland, California, against the Raiders' moving on the basis of Rule 4.3.[6]

Raiders cross-complained against NFL and the other clubs (hereafter collectively referred to as NFL), charging violation of Sherman Act, Section 1, and also charging breach of the *obligation of good faith and fair dealing inherent under California law in every contract.* The case was jury tried. The jury returned a verdict that NFL violated the antitrust law, and it *also* returned a separate verdict that the NFL had violated the obligation of good faith and fair dealing. The verdicts rested on an abundance of evidence that NFL and its member clubs denied the

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what is implicit in the verdict of the jury in the present case. The eminent domain court (a Northern California court, not a Southern California court) found:

> "On January 22, 1980, proposals for a new agreement were made to The Raiders by a committee representing the [Oakland-Alameda County Coliseum] Commission. Terms were then informally agreed upon which were characterized by the Mayor of Oakland, a committee member, as reasonable to the parties and meeting the legitimate needs of The Raiders. According to the evidence, the Commission did not execute this proposed agreement because a member of the Commission phoned Mr. Rozelle and was assured by him that the NFL would not permit The Raiders to move from Oakland. This promised restraint was unlawful."

The court in the eminent domain case also found

> "that the City of Oakland acted in concert with the National Football League to prevent The Raiders from moving from Oakland through a combination of City's exercise of eminent domain and the NFL's refusal to consent to the move."

[6]That injunction was dissolved in 1982 at NFL's request after the judgment of the trial court in this case that Rule 4.3 as applied was illegal.

Raiders the right to move, not for any legitimate reason, but out of animosity, to protect its anticompetitive rules, and to place the Raiders, the "winningest" club in football, at a competitive disadvantage.[7]

Thus, until the jury verdict, Raiders were held prisoner in Oakland, totally excluded from Los Angeles, denied the right to compete with the Los Angeles Rams in that market and denied the ability to be competitive with the other clubs in the '80s, and the Los Angeles Coliseum was denied the right to compete with the Oakland Coliseum for the tenancy of the Raiders.

With these basic facts before us, we turn to the legal issues.

SUMMARY OF ARGUMENT FOR NOT ISSUING A WRIT.

1. The individualities of professional football served their full possible function by getting the case to the jury on the Rule of Reason standard, although ordinarily allocation of territories is illegal *per se*. The "ancillary restraint" doctrine would do no more, and in fact less. It would have required use of the least restrictive alternative, and here the trial court's instruction applied a much milder burden. The jury having spoken and found "unreasonableness", NFL cannot escape unless there were either no restraint at all or no concert.

2. Self-evidently, there was a restraint of trade, for both the Raiders and Los Angeles Coliseum were restrained from doing what otherwise they would have done competitively, and each club enlisted the aid of every other to maintain a rule of arbitrary exclusion to protect itself against any "invasion" by anyone else.

3. There was concert of action. The NFL defendants were not a "single entity" but 27 clubs, each separately owned, in a horizontal relationship of contract, not con-

trolled by a single will or conscience. Thus not *Copperweld* but *Soccer* controls.

4. What NFL seeks is an exemption from the Sherman Act which only Congress can give, which NFL has repeatedly sought of Congress, and which Congress has repeatedly declined.

ARGUMENT

I. The Jury Having Spoken, No Issue About Unreasonableness Exists. Therefore NFL Wishes to Escape the Rule of Reason.

Ordinarily, the controversy in an antitrust case is whether the reasonableness of the restraint is to be tested by a *per se* standard or by the Rule of Reason. In all other economic activity, a division or allocation of territories is illegal *per se*.[8] And the restraint of trade in this case consisted of *division and allocation of territory,* maintaining "territorial exclusivity", regional protection of each club from competition, preservation of monopolistic satrapies. Nevertheless, NFL successfully persuaded the trial court to put the case to the jury on the Rule of Reason standard, on the basis of the particular character of a professional sports league.

A notable fact is that NFL is *not* complaining of any holding that its conduct was *per se* illegal, for there was no such holding. NFL leaps far to the other end of the spectrum to contend that its conduct was *per se lawful*! Thereby it totally evades the issue of the *unreasonableness* of its conduct and seeks to escape the consequences of the elementary law that the reasonableness of a restraint of

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[7]Petition (p. 4) asserts that the 27 NFL clubs refused to allow Raiders to move after investigation. Raiders' evidence was that the investigation was a sham, by a "stacked" committee. The jury verdict sustained that version.

[8]*United States v. Topco Associates,* 405 U.S. 596 (1972); *United States v. Sealy,* 388 U.S. 350 (1967); *North American Soccer v. National Football League,* 670 F.2d 1249, 1258 (2 Cir.), *cert. denied,* 459 U.S. 1074 (1982).

trade is a question for the *factfinder,* here the jury. *Continental T.V. Inc. v. G.T.E. Sylvania Inc.,* 433 U.S. 36 (1977).[9]

NFL paints the individual characteristics of the professional sports business as different from a variety of other businesses. Its argument both starts and ends with the premise that there is a significance of a sports "league". The premise has never been disputed. Professional football is a species of business in which numerous separate entities engage, each for profit, and by the nature of the business the clubs must play each other. To the end of arranging the games and administering the playing against each other, cooperative action *is* necessary. The significance of a league is that it is the apparatus to administer the playing of games. *Within that context and for that limited purpose,* agreement and cooperation can be reasonable. But insofar as cooperative action infringes upon the freedom of competition, the law is violated.

The particularities of professional football *do* enter into antitrust consideration about legality of conduct. But the point where they enter is at the inquiry whether the particular agreement or conspiracy under review is illegal *per se* or is to be tested by Rule of Reason. That is precisely what the trial court held (Pet., p. 59a):

> "But such unique features [of NFL] are relevant in weighing the reasonableness of the restraint at issue in this case—a task for the jury—and do not suffice to exempt that restraint from antitrust scrutiny altogether by establishing a single entity defense."

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[9]As there said (p. 49):

> "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."

Betaseed, Inc. v. U and I Inc., 681 F.2d 1203, 1228 (9 Cir. 1982), phrased the matter succinctly so: "[T]he reasonableness of a restrictive practice is a paradigm fact question".

Rule of Reason is a remarkable instrument, supple, flexible, and acute for taking into consideration the particularities or individualities of a particular industry in adjudging antitrust violation. The Rule of Reason gives the Act "both flexibility and definition", *Nat. Soc. of Professional Engineers v. U.S.*, 435 U.S. 679, 688 (1978). Here all the peculiarities of professional football expatiated on in the petition were presented to the jury for its consideration. NFL was permitted to adduce all the evidence it desired, its counsel argued to the jury freely, and the trial court gave these instructions:

> "The antitrust laws are not intended to frustrate legitimate business operations or to prohibit a degree of mutual cooperation among businesses when such arrangements have no significant and unreasonably restrictive effect on commercial competition in interstate commerce and trade." (Tr.2d 7209)
>
> * * *
>
> "In deciding whether Rule 4.3 is an unreasonable restraint on competition, you must consider all relevant factors. You should consider the following factors, among others: First, the nature of the particular industry involved; second, the facts which are peculiar to the particular industry involved; third, the nature of the restraint and its effects, actual and probable; fourth, the history of the restraint, and fifth, the reasons for engaging in the particular restraint." (Tr.2d 7216-17)
>
> * * *
>
> "In addition, in deciding whether or not Rule 4.3 is unreasonable, one factor you may consider is *the degree of mutual cooperation inherent among the member clubs of a professional sports league and the extent to which professional sports leagues differ from ordinary kinds of businesses.*
>
> "*For example, no NFL club acting alone can produce NFL football games and telecasts.*" (Tr.2d 7218)

NFL's petition refers to the doctrine of "*ancillary restraints*" (Pet., pp. 21-22). That doctrine relates to the situation of certain agreements for legitimate purposes in which there are incidental or "ancillary" restraints. One need not tarry over whether the doctrine applies to this kind of case, because the function of "ancillarity" in antitrust analysis is merely to remove, in some instances, the *per se* label from restraints otherwise illegal *per se* and to permit them to be judged by Rule of Reason treatment. So Bork, "Ancillary Restraints and the Sherman Act", 15 ABA Antitrust Law Section 211, 212 (1959), cited in the petition, states:

> "The ancillary restraint is thus tested in the same manner as all other *non-per se* restraints. The function of *ancillarity,* then, is to remove the *per se* label from restraints otherwise falling within that category."

So also, Restatement (Second) of Contracts § 188 (1981); *Aydin Corp. v. Loral Corp.,* 718 F.2d 897, 901 (9 Cir. 1983).

Here, not only was Rule of Reason treatment given by the trial court to NFL, *the court's jury instructions gave NFL more favorable treatment that the ancillary restraint doctrine would accord it.* As the Restatement, § 188(1)(a) and comment (d) teaches, the ancillary restraint rule does not permit a "restraint . . . greater than is needed to protect the promissee's legitimate interest"; the restraint must be the *least* restrictive *necessary* to achieve the legitimate end. Here, by contrast, the jury was instructed that the fact, if it were a fact, that "Rule 4.3 imposes a restraint broader than reasonably necessary to achieve its purpose" was only one factor, and that the jury was to consider "whether Rule 4.3 was fairly necessary in the circumstances of the case or whether it exceeded the outer limits of restraint reasonably necessary to protect the defendants' legitimate purpose" (Tr.2d 7218). Rule 4.3 could pass this test even though it was not the least restrictive alternative. In *North American*

Soccer v. National Football League, supra, 670 F.2d 1249, the Second Circuit imposed the stricter standard that if a less restrictive alternative is available the use of the more restrictive is unreasonable. This Court denied certiorari, 459 U.S. 1074 (1982). Justice Rehnquist dissented from the denial because, *inter alia,* he disagreed that availability of a less restrictive alternative was decisive and believed "that the possibility of less restrictive alternatives is only one among many proper considerations for the factfinder" (459 U.S. at 1080). In the present case precisely that more relaxed standard was given to the jury. It may be noted, in this connection, that the petition (p. 22) misleadingly states that the court below required the "location agreement to survive a 'less restrictive alternative' analysis". That is not so. *Even with the less rigorous instruction, the jury found that NFL's conduct was unreasonable.*

The petition (pp. 3-4) assigns to Raiders the contention that any "limitation on an individual member's ability to determine unilaterally the location in which it will" operate violates the Sherman Act. That, too, is not so, and it never has been so. Raiders have never asserted that kind of position, which NFL has characterized as "anarchy". Raiders have always agreed that NFL has a legitimate interest in where any member club may play its home games. It is NFL that has taken the extreme position, at the other pole, and it has become more extreme in its contention as the litigation has proceeded. At the beginning, in 1978, Commissioner Rozelle listed the several considerations he thought relevant to "where new or existing franchises shall be located or transferred" (Ex. 41, ¶ 8; Ex. 2344). They were travel costs, stadium appeal, effects on gate receipts, effects on TV scheduling and ratings, league schedules, and a number of others. But at the trial NFL witnesses conceded (Tr. 2d 6044-46, 7062), and Raiders' Managing Partner, Mr. Davis, testified (Tr.2d 4610-11) that a transfer of the Raiders to Los Angeles would not have adversely affected

any one of the listed factors. None of the factors listed by Mr. Rozelle as pertinent to a relocation is mentioned in Rule 4.3. None was even put to the NFL clubs when they voted to prevent the Raiders from moving. The rule provided no standards for determining whether a club might move. Any clubowner could vote against another club's transfer of location for any reason or for none, for malice or pique, and the vote would count without inquiry into the reason for it (Tr.2d 7061-62). There were no "guidelines".

In 1978, when the rule was amended, Mr. Davis objected both to the rule and the amendment, insisting that the correct course was to remove the control of transfers of location from the selfish caprice of the clubowners, to establish *wholly objective* standards to determine whether a club could move, to be applied in case of dispute by an impartial tribunal (Pet., p. 27a). Davis' objection to the lack of objective standards of rules subjecting one to the decision of competitors and thus capable of being made "arbitrarily and capriciously" is an objection shared by the antitrust law, *Radiant Burners v. Peoples Gas L. & Coke Co.*, 364 U.S. 656, 659 (1961).[10]

The Raiders were prevented from moving to Los Angeles, and the Los Angeles Coliseum was prevented from obtaining the Raiders, by the capricious and arbitrary exercise of the power conferred by Rule 4.3 *without any justifying reason ever being required, sought, or being given by any club, and, as the jury found, in violation of the obligation of good faith and fair dealing.*

NFL's position is the defiant one that it has the *autocratic* right to fix the locations of teams, free of the Sher-

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[10]To same effect, *Hydrolevel Corp. v. Am. Soc. of Mech. Engineers*, 635 F.2d 118, 127 (2 Cir. 1980), *aff'd., American Soc. of Mech. Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1381-82 (5 Cir. 1980).

man Act's survey of reasonableness, not answerable to either authority or principle. It is that extreme position that the judgment in the case adjudicated to be unlawful. Nothing was adjudicated about the lawfulness of some nonexistent set of objective standards applied by impartial machinery.

In fn. 6 on page 7 the petition refers to L. Koppett, *Sports Illusion, Sports Reality,* p. 285 (1981), as an economist and commentator who has recognized the unique nature of league football. But the thrust of what Koppett said is wholly contrary to the position NFL takes in its petition. Said he (at p. 287):

> "Sports authorities have always maintained that they will take their chances with any rule-of-reason defense, and be able to live with the consequences, win or lose. What terrifies them, and hangs over them as a perpetual threat, is the possible finding that something is a per se violation. The per se doctrine is generally applied to price fixing, group boycott, and territorial division of markets—activities built into sports as we know it. Some indication, by means of legislation, that in antitrust cases, sports businesses can have the rule of reason applied to *all* their operations, would ease the climate without threatening the safety of the republic or the legitimate rights of anyone." (Emphasis in original.)

Legislation, said Koppett, freeing league sports from *per se* treatment and letting all their practices be judged by Rule of Reason would be enough. In this case NFL was judged by the supple Rule of Reason. To maintain its position, it must look elsewhere. But looking elsewhere, it fails to make clear whether it claims that (a) there was no concert of action or (b) that there was no restraint. It approaches each but glides from it to the other to avoid becoming answerable to either. We consider each of these areas in turn.

II. Patently There Was a Restraint of Trade.

Tucked away (Pet., p. 20, and elsewhere) is a sentence asserting that the issue is whether the league agreement on team locations constitutes a restraint of competition! This is astonishing, because what constitutes a "restraint" of trade is the one area of antitrust law, apart from labor strife, where there has never been disputation or difficulty.

"Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence", *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918). Whatever prevents a person from doing what he would otherwise do or compels him to do what he otherwise would not do is a "restraint"; and, if the subject of the restraint is economic activity, the restraint is a restraint of trade. A concert whereby the parties "put themselves into a situation of restraint upon their freedom to carry on . . . commerce according to their own choice and discretion" is an antitrust restraint, *Anderson v. Shipowners Asso.,* 272 U.S. 359, 365 (1926). "Coercive activity that prevents its victims from making free choices between market alternatives" is a restraint, *Associated General Contractors v. Carpenters,* 459 U.S. 519, 528 (1983). In the *NCAA* case (*NCAA v. Board of Regents of Univ. of Okla., supra,* 82 L.Ed.2d at 82 (1984)), the Court remarked:

> "There can be no doubt that the challenged practices of the NCAA constitute a 'restraint of trade' *in the sense that they limit members' freedom to negotiate* and enter into their own television contracts."

Nor can petitioners escape this elementary fact by admitting a "restraint" but asserting that it was not on "competition". One need merely look at the facts. Before the trial court's judgment in mid-1982, the Raiders were prevented from playing their home games in Los Angeles, in "tremendous competition", "head-to-head", with the Los Angeles Rams (Tr.2d 5037-38). Before the judgment, the Los

Angeles Memorial Coliseum was prevented from competing with the Oakland-Alameda County Coliseum for the Raiders as a tenant. After the judgment removed NFL's road-block, Raiders played in Los Angeles in the 1982, 1983, and now 1984 seasons, and the Los Angeles Memorial Coliseum was able to obtain the Raiders as a tenant.

The restraint on competition was even more sweeping than these particulars. The greater restraint was succinctly expressed by Judge Learned Hand and quoted by Justice Frankfurter in his opinion in *Associated Press v. United States,* 326 U.S. 1, 27 (1945).

> "'Although, as we have said, only a few members will have any direct personal interest in keeping out an applicant, the rest will not feel free to judge him regardless of the effect of his admission on his competitors. *Each will know that the time may come when he will himself be faced with the application of a competitor.*'"

It is an offense to intelligence to assert that there was no "restraint" of trade. The *NCAA* case and *Chicago Board of Trade* return this case to where it belongs, whether the restraint was unreasonable. And the jury's verdict ends that inquiry.

III. There Was Concert of Action.

We turn to "concert of action". Rule 4.3 was concerted action.[11] So was the vote of the member clubs refusing to allow the Raiders to leave Oakland.

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[11]As said in *Hennessey v. National Collegiate Athletic Ass'n,* 564 F.2d 1136, 1147 (5 Cir. 1977),

> "conceptually the adoption and execution of the NCAA Bylaw can be seen as the agreement and concert of action of the various members of the association, as well as that of the association itself . . . . Indeed, it should be taken as undisputed that the defendant has been a party to a contract or combination . . . ."

Petitioners sought, below, to escape that obvious conclusion by arguing that the 28 member clubs are a "single entity", no more capable of conspiring or agreeing than a man with himself. But that position is no longer so baldly taken in the petition. Its sole "question presented" asks whether "the league *agreement* designating the locations" is unlawful (see p. 1, *supra*). That very phrasing concedes that there was an *agreement,* and an "agreement" is the stuff of Sherman Act, Sec. 1. Moreover, the petition says, in a footnote to its "question":

> "Petitioners do not make, and this question does not raise, any contention that all actions by a league and its members are beyond attack under Section 1 of the Sherman Act."

But, if NFL and its members were a "single entity", the Sherman Act could never apply unless NFL concerted with nonmembers. An amoeba does not subdivide for some purposes and recoalesce for others.

NFL's argument of "single entity" was rejected in *North American Soccer, supra,* 670 F.2d at 1257, the Second Circuit characterizing it as a "loophole" "[t]o tolerate" which "would permit league members to escape antitrust responsibility . . . . " This Court denied certiorari, 459 U.S. 1074 (1982). The petition insists that the *Soccer* decision and this Court's denial of certiorari just two years ago were erroneous (Pet., p. 18). By asking the Court to change its mind now, it is asking the Court to bring itself within Justice Roberts' tart comment in *Smith v. Allwright,* 321 U.S. 649, 669 (1944), that "adjudications of this tribunal [should not be brought] into the same class as a restricted railroad ticket, good for this day and train only".

The petition refers to Justice Rehnquist's dissent from the denial of certiorari in *Soccer.* But Justice Rehnquist's opinion drew a distinction between a situation where the assailed rule is aimed by one sports league at a competing

sports league—as in *Soccer*—and a situation where the rule impedes competition *within* the NFL itself, precisely the situation of this case. Said Justice Rehnquist (459 U.S. at 1077):

> "[I]nterteam competition occurs when two teams are located in one major city, such as New York *or Los Angeles*. These teams compete with one another for home game attendance and local broadcast revenues. In all other respects [*i.e.*, not in that respect], the league competes as a unit against other forms of entertainment."

The petition tries to bring NFL's case within Justice Rehnquist's reasoning by asserting (p. 18) that the issue relates to NFL's activity "in a broad entertainment market". But that argument is foreclosed by the jury verdict, for the issue of what constituted the relevant market was put to the jury, and it found against a "broad entertainment market".[12] What constitutes the relevant market is a

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[12]The jury was told that NFL denied that NFL football alone can be treated as a relevant product market and contended that NFL football competes with many other forms of entertainment, that

> "all the parties agree that the second relevant product market includes at least NFL football. They disagree as to whether this second product market includes anything else. *You will have to decide this.*
>
> • • •
>
> "In this case, the broadest second relevant product market that you could find would include the entire field of entertainment; the narrowest would be NFL football alone." (Tr.2d 7213-14)

At pp. 25, 26 petition makes querulous comment about "relevant market", once more plucking phrases out of context (see comment at p. 20, *infra*). But nothing about "relevant market" is stated in any "question presented". The opinion of the court below (Pet., pp. 16a-21a) speaks for itself on the subject.

question of fact, *International Boxing Club v. United States,* 358 U.S. 242, 251 (1959), and, where a jury is the factfinder, its verdict is conclusive unless there is no substantial evidence whatever to support it, *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 979 (5 Cir. 1977), *cert. denied,* 434 U.S. 1087 (1978). And sufficiency of evidence of a particular case is not a certiorari matter.

The petition cites *Copperweld Corp. v. Independence Tube Corp.*, ... U.S. ....., 81 L.Ed.2d 628, 633, 104 S.Ct. 2731 (June 19, 1984). But that decision relates solely to "a parent corporation and its wholly owned subsidiary". Its reasoning is that the assailed conduct is the *unilateral* conduct of the parent. Where the parent gives *direction,* there is no concert of activity; no independent will of a second entity enters into what is done. There is merely the direction and control by the legal person which, under the law, has the power to *order* and *direct*, and it is irrelevant whether that person is a natural person or a corporation. As stated in Areeda, 97 Harv.L.Rev. 451, 470 (1983), "when a subsidiary obeys its owner's will" there is direction, not agreement. This Court remarked in *Copperweld* of a "parent and its wholly owned subsidiary", that "their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one". It said further:

> "We limit our inquiry to the narrow issue squarely presented: . . . . We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own." (81 L.E.2d at 640-41)

The present case is not only not a parent-subsidiary case, it does not even have anything to do *with affiliated corporations.* As the petition concedes (at p. 2), the clubs are all under "separate ownership". Here there is *no vertical* relationship between the defendants, no club owns any interest

in any other, no one of them has any power of control over any other, the agreement among them is wholly a *horizontal* agreement among independent entities, each one of which controls its own affairs. The Raiders were excluded from Los Angeles, not at the direction of some top parent pulling strings on ventriloquist dummies, but upon the vote of the 27 independent clubs acting in horizontal agreement (Pet., p. 10a).

The assigned foundation of *Copperweld* is a conception of *reality*. To apply *Copperweld* here would be to move from reality to an area of metaphysical subtleties that could only lead to years of litigation picking at the onionskin of reasoning.

NFL (at p. 16) cites *Sunkist Growers v. Winckler & Smith Co.*, 370 U.S. 19 (1962). That had to do with the statutory exemption to the antitrust law given by Congress to cooperatives of agricultural producers. Sunkist, a cooperative, handled lemons through one wholly-owned subsidiary and oranges through another; the members of each were members of Sunkist. All that this Court held was that, inasmuch as *Congress* allows farmers to associate together, there is no reason why they may not associate through the medium of these corporations.

The petition (at p. 16) also cites *United States v. Citizens and Southern National Bank*, 422 U.S. 86 (1975), saying that in it this Court "characterized as a 'total lack of realism' a claim that a common enterprise consisting of a parent bank and several separate banks in which the parent held five percent stock interests was a conspiracy in violation of Section 1". This is creative "quotation"; the Court said no such thing. The petitioners pluck the words "total lack of realism" from quite a different sentence, which is this: "Putting to one side the total lack of realism in suggesting that C&S might have founded new banks that

would have competed vigorously with it and with each other . . . ." (422 U.S. at 119).[13]

In the end NFL's argument rests on the verbalism that it is a "joint venture". But NFL is not a partnership,[14] and, short of an actual partnership, "joint venture" has no immunizing quality. Neither authority nor reason supports petition's assertion (fn. 34, p. 21) that the terms "partnership" and "joint venture" are synonymous for purposes of antitrust analysis. In *NCAA v. Board of Regents of Univ. of Okla., supra,* ..... U.S. ....., 82 L.Ed.2d at 91, decided but eight days after the *Copperweld* case, this Court remarked that "joint ventures have no immunity from the antitrust laws". The term "joint venture" is merely a generality for some kind of concerted activity, and concerted activity is the very core of the antitrust law. The *nature* of a particular joint venture may enter into determination of "reasonableness", but the *fact* of a joint venture does not immunize concerted action from analysis of the reasonableness of the restraint.

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[13]In the *Citizens and Southern* case, a number of state banks in which C&S owned the maximum 5% interest allowed by law cooperated in ways found by the trial court not to be in violation of the Sherman Act. This Court's affirmance was based on the fact that the finding was not clearly erroneous, and that the intimate and continuous cooperation of consultation of the banks did not compel a finding contrary to that made by the factfinder that they were not conspiring to affect prices. In the present case we have the jury finding of an unlawful conspiracy.

[14]The essential elements of a partnership are the sharing of profits and losses, co-ownership by the partners of the partnership capital, and liability of each partner for the debts incurred by every other partner. See, *e.g., Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 356 (1982); *Commissioner of Int. Rev. v. Tower,* 327 U.S. 280, 286 (1946); *Beckwith v. Talbot,* 95 U.S. 289 (1877); *Berthold v. Goldsmith,* 24 How. 536 (1861), and discussion of the trial court (Pet., p. 54a) and of the Court of Appeals (Pet., pp. 11a, 12a).

In the petition the term "economic entity" runs in double harness with "joint venture". But whether there is *concert* of action depends on whether there are separate *legal entities* not directed by a single head. "Economic entity" summons up economic analysis, and the place where economic analysis enters is in application of the Rule of Reason. Another of NFL's phrasing of the same idea is that NFL produces a singular product which it calls "league football". *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963), describes the operations of stock exchanges in such a way as to show that they are just as much an "economic entity", performing the service or producing a singular product quite distinct from that of its members, as the NFL, but the Stock Exchange was held liable. In *Associated Press v. United States, supra,* 326 U.S. 1, 3-4 (1945), the Court described the Associated Press as "a cooperative association", its business being to produce a product or service quite distinct from that of its member newspapers, far more so than the NFL can be said to be doing something distinct from the individual teams. Justice Frankfurter there described it (p. 26):

> "The Associated Press is in essence the common agent of about 1300 newspapers in the various cities throughout the country for the interchange of news which each paper collects in its own territory, and for the gathering, editing, and distributing of news which these member papers *cannot collect single-handed, and which requires their pooled resources*".

The Associated Press was held liable. In *Broadcast Music, Inc. v. CBS,* 441 U.S. 1 (1979), the Court agreed with ASCAP's contention that its product was a different product from that of any of its members saying (pp. 21-22):

> "Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product."

But the Court's conclusion was *not* that ASCAP was immune. The conclusion was a remand to the Court of Appeals to explore the case under the Rule of Reason.

IV. There Is No Conflict in the Decisions. What NFL Seeks Is An Exemption from the Sherman Act that Only Congress Can Give.

Here, then, is a case where (1) there was concerted activity, (2) which effected a restraint of competition, and (3) a jury on proper instructions found the restraint to be unreasonable.

What remains? It is only that NFL marshals argument that for philosophical, emotional, or economic outlook entertained by sports aficionados or by those who look upon antitrust regulations differently than Congress did when it enacted the Sherman Act, a different law should be applied to professional football.

A. There Is No Conflict in the Decisions.

The petition does not claim that there is a *conflict* in judicial decisions warranting grant of a writ. It talks, instead, of confusion, "chaos", and of "struggle[s]" by courts. But the cited cases (Pet., pp. 7-8) are not in confusion or in chaos. In the numerous antitrust cases in which NFL has been sued over the years, the courts have patiently listened to NFL's arguments, always the same although rephrased in the language fads of the moment, and in every one has held challenged practices or rules to be unlawful except where there has been an explicit statutory exemption for the specific practice[15]; the "struggles" have been patient listening to NFL's contentions and reasoned rejection of them.

NFL's complaint (Pet., p. 9) that it is confronted with the Hobson's choice of being sued no matter what it does

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[15] *WTWV, Inc. v. National Football League*, 678 F.2d 142 (11 Cir. 1982).

is no different from what can be said by any industry. NFL has no greater burden in determining whether its rules and regulations are valid under the antitrust laws than innumerable trade associations which must determine what cooperative activities are valid and useful and what go too far. It has been advised repeatedly of the vulnerability of its rules (see pp. 4, 5, *supra*). The heart of the matter is that NFL will not heed. Let it but reconcile itself to the fact that it too must obey the law and it will have peace of mind.

B. What NFL Seeks Only Congress Can Give, and Congress Has Repeatedly Refused.

In 1958, when Bert Bell was its Commissioner, NFL requested Congress to exempt its territorial rules and Congress declined to do so (see pp. 3-4, *supra*). In 1964, Mr. Rozelle having become Commissioner, NFL again asked Congress for an exemption of a number of its rules, including its territorial rules, and sought enactment of S. 2391.[16] Mr. Rozelle urged on Congress exactly the same arguments made in the present petition, saying (p. 112):

> "the member clubs of a professional football league are in a unique relationship. We view the league as a joint venture or form of partnership, with the commissioner acting as the presiding officer."

The bill died in committee. It was re-presented in 1965 as S. 950.[17] Mr. Rozelle summoned up the same argument, saying (p. 198):

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[16]Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 88th Congress, Second Session, on "Professional Sports Antitrust Bill—1964".

[17]Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 89th Congress, First Session, on "Professional Sports Antitrust Bill—1965."

> "There is first the unique relationship which exists among member clubs of a sports league. On the playing field, they are clearly competitors—and every effort must be made to preserve this relationship. But in most other areas of their operations, they are partners or joint venturers acting together in a common enterprise."

Again, Congress did not grant the exemption.

In 1966 NFL obtained exemption from Congress for merger with AFL. The present petition (at p. 19) tries to squeeze more out of the 1966 Act, but NFL obtained that exemption by assuring Congress at the time that the bill would not grant the exemption refused by Congress in 1964 and 1965 and that NFL would still have to answer under the Sherman Act in all other respects and particularly as respects the very rules about territorial rights and removal of clubs.[18]

Since the Raiders sought to move to Los Angeles in early 1980, numerous bills have been introduced in Congress to regulate the subject of professional team relocation. Some would lay down a set of objective guidelines (*e.g.*, H.R. 823 and H.R. 3287, introduced in 1981). Others would set up a regulatory administrative agency (*e.g.*, "Sports Competition Act of 1983", introduced on May 23, 1983, as H.R. 3094, and H.R. 3944 introduced on September 21, 1983). NFL has opposed these bills, for it wants free license left in its own hands. The bills NFL has proposed or supported would do

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[18]Hearings of the Antitrust Committee of the House Committee on the Judiciary on S. 3817, "Professional Football League Merger". Commissioner Rozelle so assured the Committee at page 68.

In response to direct questions by Mr. Kenneth R. Harkins, Chief Counsel of the Subcommittee, and by the Chairman, the Honorable Emanuel Celler, about "territorial rights, removal of teams, entry of new clubs, . . . all the provisions of your constitution and bylaws"; "How about territorial rights? How about removal of teams?", NFL's counsel, Mr. Carothers answered that "this is not what [NFL] wants", it wanted no more than to be free of challenge as a result of a merger (pp. 78, 79).

just that, such as H.R. 6467, introduced in the 97th Congress, Second Session, on May 21, 1982, and H.R. 2041 introduced in 1983, which sought to legislate

> "that—(1) It shall not be unlawful by reason of any provision of the antitrust laws for a professional team sports league and its member clubs—
>
> "(a) to enforce rules requiring approval by the membership of the league for any relocation of a member club of such league."[19]

Both H.R. 6467 and H.R. 2041 would apply to pending actions unless a final unappealable judgment preceded enactment; this was obviously an attempt to have Congress wipe out the instant action retroactively. A similar bill was introduced in the Senate on July 28, 1982, as S. 2784; another similar bill was introduced as S. 2821.[20] The deluge of bills has continued into the 98th Congress in 1984, with H.R. 5388, on April 5, 1984, and H.R. 5430, entitled "Professional Sports Team Community Protection Act", on April 11, 1984.

No bill has emerged from Committee. That fact shows that Congress is yet to be convinced that the interests of the nation are not best served by letting professional football answer to the same antitrust law as the rest of the citizenry and business in general.

Human wit is incapable of conceiving, and human pen of expressing, any judicial formula that would exempt NFL's activities from the antitrust principles while at the

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[19]Oversight Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, Ninety-Seventh Congress, First and Second Sessions, on H.R. 823, H.R. 3287, and H.R. 6467, Antitrust Policy and Professional Sports, Serial No. 114.

[20]Hearings Before the Committee on the Judiciary, United States Senate, Ninety-Seventh Congress, Second Session, Serial No. J-97-134, on "Professional Sports Antitrust Immunity".

same time not plunging the entire business world and the whole body of antitrust law into years of litigation. Courts must state a coherent body of law, and any attempted non-legislative distinctions can only metastasize.

CONCLUSION

Over 25 years ago, in *Radovich v. National Football League, supra,* 352 U.S. 445 (1957), this Court drily described NFL's argument for exemption from the antitrust laws as being that "the contracts and sanctions . . . that football find[s] it necessary to impose have no counterpart in other businesses [other than baseball] and that, therefore, they . . . are outside the ambit of the Sherman Act" (p. 450). The Court said that the claim "need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade' " (p. 453) and that it is the law of the land "that such prohibited activities are injurious to the public" (p. 453).

The arguments of the petition are identical in substance with those urged on the Court in *Radovich.* They should be given the same answer now as then.

We respectfully submit that the petition should be denied.

Dated: San Francisco, California, October 12, 1984

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

NATIONAL FOOTBALL LEAGUE, et al.,
Petitioners,

vs.

OAKLAND RAIDERS, LTD. AND LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

BRIEF OF RESPONDENT LOS ANGELES MEMORIAL COLISEUM COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF OF RESPONDENT LOS ANGELES MEMORIAL COLISEUM COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether separately owned and operated business entities which comprise the National Football League and which compete economically can agree to divide territories with a concededly anticompetitive purpose and effect, with complete immunity from Rule of Reason scrutiny under Section 1 of the Sherman Act.

COUNTERSTATEMENT OF THE CASE

Although loath to acknowledge it, the NFL owners seek from this Court nothing less than a blanket exemption from the application of Section One of the Sherman Act. In deference to the "unique" attributes of a sports league, the courts below refrained from striking down the NFL

owners' *per se* illegal agreement to carve out exclusive markets and instead applied traditional Rule of Reason standards. Not satisfied with the opportunity thus afforded them to prove that their conduct had redeeming virtues to offset its obvious anticompetitive impact, the NFL owners now seek to escape even from Rule of Reason review. Their petition does not deserve serious consideration.

The only issue presented by the NFL's petition is whether the necessity to cooperate to market the product warrants total immunity or can be accounted for under a Rule of Reason analysis. This Court and the courts of appeal have uniformly opted for a Rule of Reason review in every case which has presented this question. The courts below followed the directive of the Court in *Broadcast Music, Inc. v. CBS,* 441 U.S. 1 (1979), and the validity of their approach was confirmed last term by the decisions in *National Collegiate Athletic Association v. Board of Regents,* 104 S.Ct. 2948 (1984) and *Copperweld Corp. v. Independence Tube Corp.,* 104 S.Ct. 2731 (1984).

The NFL's quest for special immunity is properly addressed to Congress, where in fact the petitioners have mounted an extensive but entirely unsuccessful lobbying campaign.

THE FACTS

This litigation commenced in September, 1978 when respondent Coliseum filed suit against each of the NFL clubs, seeking injunctive relief which would prohibit them from enforcing Rule 4.3 of their Constitution and By-Laws. Rule 4.3 provided that a club owner wishing to transfer to a "neutral" territory had to obtain approval of three-quarters of the other NFL owners. However, if the owner wished to move into another owner's territory, the vote of approval had to be unanimous, thus enabling an owner to

veto the entry of another club into "his" territory. Such a rule had been in the NFL Constitution since at least the 1920's. The evidence at trial demonstrated that the historic purpose of the rule was to protect one NFL firm from economic competition from another club in the same territory. *E.g.*, 13 Tr.2d 2321; Px. 365; 13 Tr.2d 2322-23; Px. 366; 31 Tr.2d 7051-52; 31 Tr.2d 7079-82.

Three weeks after the Coliseum filed its complaint, the NFL owners held a meeting in Chicago. Following a discussion of the Coliseum's lawsuit, the owners voted to amend Rule 4.3 to eliminate the telltale double standard and require that any move would be subject to approval by three-fourths of the owners. The evidence revealed that the amendment was adopted not because the historic purpose of the rule was suddenly abandoned, but because the owners were told by the Commissioner and their attorneys that there was no defense to the Coliseum's lawsuit. Px. 3; 13 Tr.2d 2364; 22 Tr.2d 4557-58. Px. 191. See Court of Appeals discussion, App. A, 2a.[1]

The trial further established that NFL firms which operate in the same geographic area compete across a wide spectrum of business activities. Two NFL firms in the same territory (*e.g.*, New York or Los Angeles) compete with respect to gate receipt revenue, radio broadcasting revenue, preseason television revenue, employment of scouts, players, coaches and other management personnel, merchandise revenue and media space.

Thus, the use of Rule 4.3 to prevent the Raider transfer eliminated competition between the Rams and the Raiders in Southern California. Equally important, the very existence of the rule was shown to have a far broader impact.

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[1]References to the Ninth Circuit's opinion, contained in Appendix A of the NFL's petition, are denoted by "App. A-"; references to the District Court's opinions, contained in Appendices B, C and D of the NFL's petition, are similarly denoted.

In the absence of Rule 4.3, each NFL firm would be a potential competitor of every other NFL firm. The firms would compete with each other with respect to those markets which could support more than one NFL club, and each of the 28 firms would face the potential of entry into "its" territory. *E.g.*, 31 Tr.2d 7051-52.

The anticompetitive purpose and effect of Rule 4.3 were amply demonstrated at trial and are not challenged by petitioners. Rather, the NFL clubs seek to insulate Rule 4.3 from judicial review under the antitrust laws by claiming that the NFL clubs constitute a "single enterprise". Absent from the NFL's petition, however, is the factual description of the NFL clubs upon which any such claim must be evaluated. The NFL is an unincorporated association consisting of 28 separate firms, each of which operates a professional football club. The NFL Constitution itself states that "the purposes and objects for which the League is organized are: a) to promote and foster the primary business of League members, each member being an owner of a professional football club". 13 Tr.2d 2312.

Each NFL firm is separately owned. In fact, the NFL constitution forbids an owner from having any financial interest in any other NFL firm. Each NFL firm is a separate legal entity — some are structured as corporations, others are partnerships and a few are sole proprietorships. App. A. 12a.

The NFL firms do not share profits or losses. Each owner is free to dispose of all profits in any manner he or she chooses. The clubs do not share any revenues from local television, radio, concessions, merchandise sales, parking or private box rentals. Nor do the firms share individual operating expenses, which vary widely from club to club. Each firm maintains its own books and records and financial

statements, and the NFL firms do not exchange this data among themselves.

Each NFL firm owner makes its own business decisions, including ticket prices, player acquisitions, player salaries, hiring of coaching and administrative personnel, operating procedures, terms of stadium leases, negotiation of radio and preseason television contracts and acquisition of physical facilities.

No NFL firm has any liability for the contractual obligations or debts of any other NFL firm.

Because each NFL firm is separately owned and operated, and does not share profits or losses, there are wide variations in net profits among the NFL clubs.

In sum, the NFL clubs are separate business entities by all of the accepted legal and economic criteria. In fact, the only structural difference between the NFL firms and competitors in any other industry is that the NFL firms must agree upon certain mechanical matters, such as hiring referees, adopting rules of play and adopting schedules, in order to play games. The need for this type of limited cooperation is hardly unique to sports leagues: competitors in various industries are required by the nature of the business to cooperate in certain aspects. *E.g.*, oil companies must make crude oil and product exchanges (*Standard Oil Co. v. Federal Energy Administration*, 465 F.Supp. 274 (N.D. Ohio 1978 *affirmed* 612 F.2d 1291 (Temp. Emergency Ct. of App. 1979)); airlines must share ticketing and airport facilities; telecommunications companies must share transmission lines. In fact, such cooperation is necessary in any industry which conducts transactions requiring a buyer and seller, *e.g.*, realtors (*U.S. v. Realty Multi-List*, 629 F.2d 1351 (5th Cir. 1980); or stock brokers (*Silver v. New York Stock Exchange*, 373 U.S. 341 (1963)).

REASONS FOR DENYING THE WRIT

The Ninth Circuit's decision employs settled antitrust principles to arrive at a result which is perfectly consistent, not only with the applicable decisions of every other Circuit, but with the recent decisions of this Court. The application of the antitrust laws to sports leagues has posed no particular difficulties for the courts, which have consistently applied the Rule of Reason to evaluate the claims of leagues that their unique structure might justify conduct which would be condemned out of hand in any other industry. Only last term this Court confirmed that sports leagues cannot evade scrutiny under the antitrust laws merely because they must cooperate to produce games. *National Collegiate Athletic Association v. Board of Regents,* 104 S.Ct. 2948 (1984). Even prior to the *NCAA* decision, the Court denied *certiorari* in *North American Soccer League v. NFL,* 670 F.2d 1249 (2d Cir. 1982) *cert. denied,* 459 U.S. 1074 (1982), wherein the NFL presented the identical question for review.

I.

THE APPLICATION OF SHERMAN § 1 TO SPORTS LEAGUES HAS POSED NO DIFFICULTIES WHICH WOULD JUSTIFY DEVIATION FROM ENTRENCHED PRECEPTS OF ANTITRUST LAW

The sole issue presented for review[2] is the appropriate treatment under Sherman § 1 of a sports league's division of territories. The NFL's contention is that a sports league has such unique attributes that the concerted division of markets into exclusive territories, normally condemned

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[2]This brief also addresses on behalf of both respondents the motion advanced by the City of Oakland that due process required a jury composed differently than the one selected by petitioners themselves.

under a *per se* rule because of the manifest anticompetitive effects,[3] should be deemed *per se legal* as a matter of law.

The heart of the NFL's contention is that its division of territories has certain procompetitive effects, and in fact is actually a necessity for the operation of a sports league. The courts below did not ignore this assertion — on the contrary, they responded to it by refraining from application of the normal *per se* rule, putting respondents to the burden of proving that Section 4.3 was anticompetitive under the Rule of Reason.[4]

The courts below responded properly to the NFL's claim for special treatment: they simply gave the NFL the opportunity to prove its contentions. The NFL argument is essentially a *factual* assertion that its "unique" structure makes a division of territories necessary or procompetitive. At the trial, under Rule of Reason instructions expressly tailored to fit its contentions,[5] the NFL sought to demonstrate its assertions. There was a complete failure of proof. The "procompetitive" virtues turned out to be profit maximization and incentive for investment, the classic claims

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[3]*E.g., United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

[4]The Court of Appeals refused to "grant this association of 28 independent businesses blanket immunity from attack under § 1 of the Sherman Act. The unitary nature of the NFL can be accounted for by analyzing the competitive harms and benefits of Rule 4.3 under the Rule of Reason, without impinging on Congress' authority to decide whether a specific industry deserves an exemption from the antitrust laws". App. A, 13a, n.4.
Recognizing the applicability of Sherman § 1 to the NFL, Congress has twice granted limited exemptions – for the merger with the AFL and for joint television negotiations. But Congress has rebuffed the NFL's intensive lobbying campaign for a blanket exemption from Sherman § 1.

[5]32 Tr.2d at 7216-18.

made for any concerted effort to circumvent competition. *E.g.*, 31 Tr. 2d 7051-52; Px. 367; see NFL Petition, p. 13.[6]

No evidence at all was adduced to show that the NFL could not produce games without a division of territories. Indeed, common sense suggests that the NFL can function perfectly well if each team selects its own home city,[7] and the two and one-half years since entry of the permanent injunction have not yet "spelled the end of sporting leagues", as petitioners solemnly warn. NFL Petition, p. 18.

The NFL never succeeded in making the vital connection between the undisputed need to co-produce games and the asserted need to co-determine each club's home site. Even if such a necessity existed, the necessity for co-production is hardly unique to the NFL, or even to sports leagues. The claim has never yielded an antitrust exemption; rather the courts have always relied upon the flexibility of a Rule of Reason analysis.

In fact, this Court last term squarely rejected precisely the same argument advanced so persistently by the NFL. *National Collegiate Athletic Association v. Board of Regents,* 104 S.Ct. 2948 (1984) is dispositive of petitioners' argument. The NCAA is an unincorporated association of schools, just as the NFL is an association of separately owned and operated clubs. The NCAA defended its television plan as procompetitive because of the integration of functions necessary to market football games. This, of course, is the NFL's argument.

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[6]As the Court of Appeals correctly noted, this Court has long rejected the notion that "ruinous competition" is an acceptable defense. App. A, 22a. If investment in NFL clubs is not sufficiently attractive in an open market (a ridiculous premise, in any event), petitioners must accept the judgment of the marketplace. *NCAA, supra* at 2969.

[7]See the trial court's incisive discussion, App. D, 88a.

This Court agreed that *NCAA* involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all". *NCAA, supra*, at 2961. However, the Court did not even pause to consider the notion that this fact justifies complete exclusion from judicial review under the Sherman Act. Instead, the Court held that the NCAA's television plan should be evaluated under the Rule of Reason, thus enabling the fact-finder the evaluate the procompetitive justifications offered by the NCAA *Id.* at 2960-62.

NCAA definitely establishes that the necessity to cooperate to market NFL football warrants Rule of Reason treatment, but not the complete exemption sought by the NFL. Indeed, the Court expressly noted that the NCAA has a stronger need to market cooperatively than do professional leagues. *Id.* at 2961.

NCAA was in turn merely an application to the football industry of the general principles established in *Broadcast Music, Inc. v. CBS,* 441 U.S. 1 (1979). In *Broadcast Music,* the Court considered the appropriate treatment for ASCAP's blanket license, which effectively allowed companies to fix prices. Like the NFL, the defendants argued that they were a joint venture marketing a unique product which could be sold only with the co-operation of the individual composers. The Supreme Court agreed that the blanket license was a necessity if the product was to be marketed at all. *Id.* at 22-23.

The Court was thus faced with the question of what effect to give to the "defense" that the challenged conduct is essential, *i.e.,* that it is necessary to cooperate to produce the product. The answer was to evaluate the conduct under the Rule of Reason rather than a *per se* approach because "the agreement on price is necessary to market the product at all." *Id.* at 23. The Court most definitely did *not* hold, or

even intimate, that the necessity for ASCAP members to cooperate was a complete bar to the application of § 1.

The NFL cannot even make an argument as strong as ASCAP's. The conduct challenged in *Broadcast Music* — the blanket license — was *itself* necessary to market the product. However, the NFL never showed, as a matter of either logic or evidence, that a division of territories is needed to produce NFL football. The only justification for applying the Rule of Reason in this case is that the NFL must cooperate *in other ways* (*e.g.*, hiring referees) to produce games. App. A 16a. Surely it therefore follows that if ASCAP's conduct was subject to Rule of Reason scrutiny, so was the NFL's.

NCAA and *Broadcast Music* built in turn on several of this Court's seminal antitrust decisions. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), also rejects the contention that practices essential to the functions of a joint venture are rendered exempt from any sort of review under Sherman § 1. The Exchange had a by-law prohibiting members from having private wire connections with nonmembers without the approval of the Exchange, and it ordered its members to discontinue private lines to the plaintiff. The opinion's description shows unmistakably that the stock exchange was an "economic entity", producing a product quite distinct from that of its members. *Id.* at 359.

Like the NFL clubs, the individual members of the Exchange could not create their product without cooperating with each other. In fact, that truism gave rise to the suit because the "disconnected" member was effectively put out of business. *Id.* at 347-349. In spite of the need for co-production the members of the Exchange were held subject to review under the Sherman Act.

In *Associated Press, Inc. v. United States*, 326 U.S. 1 (1945), the Court again confronted a single enterprise claim. The product AP produced and sold was not that of any one member but the joint result of the effort of all its members in collecting news and redistributing news. 326 U.S. at 26. Under AP's by-laws, strikingly similar to the NFL's, no one competing with an old member was eligible for membership without the consent of its member competitor. Should the old member object to admission, approval had to be given by a majority vote of the regular member. The Court rejected AP's claim that the necessity for cooperation gave rise to an exemption from Sherman § 1.

This traditional approach to adjudicating co-production claims has been applied with the same force in the sports field. Claims of exemption have been routinely rejected in favor of Rule of Reason analysis. In *North American Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982). The Second Circuit recently and emphatically rejected the NFL's effort to create such a "loophole" in the Sherman Act:

> "The characterization of NFL as a single economic entity does not exempt from the Sherman Act an agreement between its members to restrain competition. To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. Moreover, the restraint might be one adopted more for the protection of individual league members from competition than to help the league.
>
> * * *
>
> The sound and more just procedure is to judge the legality of such restraints according to well-recognized

> standards of our antitrust laws rather than permit their exemption on the ground that since they in some measure strengthen the league competitively as a "single economic entity", the combination's anticompetitive effects must be disregarded."

Id. at 1257-58 (footnote omitted).

This Court denied *certiorari* in *NASL,* where the NFL's petition presented the identical issue raised here. *NASL v. NFL,* 459 U.S. 1074 (1982).[8]

Petitioner's description of "litigation chaos" (p. 7) is simply not an accurate perception of the state of the law. Following this Court's lead, the circuits have uniformly responded to the NFL's "unique nature" claim by rejecting its bid for *a priori* immunity while agreeing to apply the Rule of Reason in lieu of *per se* treatment. *Mackey v. National Football League,* 543 F.2d 606, 618 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977); *Smith v. Pro Football, Inc.,* 593 F.2d 1173, 1180 (D.C. Cir. 1978); *NASL v. NFL, supra; LAMCC v. NFL,* App.A.

Under traditional Rule of Reason analysis, the courts have upheld sports league rules which have no anticompetitive effects and which were reasonably required to effectuate the operations of the league. *E.g., Neeld v. National Hockey League,* 594 F.2d 1297 (9th Cir. 1979); *Levin v. NBA,* 385 F.Supp. 149 (S.D.N.Y. 1974). Thus, the NFL does not need the blanket immunity it seeks in order to preserve rules which have legitimate uses.

The solitary authority petitioners rely upon for their immunity argument is *Copperweld Corp. v. Independence Tube Corp.,* 104 S.Ct. 2731 (1984). *Copperweld* simply

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[8]Justice Rehnquist's dissent was based only upon the perceived procompetitive benefits of the rule at issue and plainly distinguished a league rule restraining inter-team competition. 103 S.Ct. at 500.

confirms the appropriateness of recognizing the capability of NFL firms to conspire with one another.

Copperweld's holding concerning the inability of a parent corporation and its wholly-owned subsidiary to conspire is predicated on their identity of interests arising from common ownership, and the absence of "a sudden joining of two independent sources of economic power . . .". *Id.* at 2742. By contrast, each of the NFL firms is a separate unit of economic power, pursuing its own interests. The NFL clubs are separately owned and managed, and do not share profits or losses. Thus, unlike a parent and wholly-owned subsidiary, each NFL club has a distinct economic interest, which frequently can place it at odds with another NFL club. Unlike a parent and subsidiary, a dollar placed in the coffers of one NFL club (*e.g.*, the Raiders) can frequently be at the expense of another club (*e.g.*, the Rams).[9] Thus, the joint decision of the club owners to allocate territories does represent the "sudden joining of [28] independent sources of economic power". See Court of Appeals discussion, App. A, 11a-12a.

The mere fact of separate ownership is sufficient to remove the NFL clubs from the ambit of *Copperweld*. The common ownership of a parent and its subsidiary is the touchstone of *Copperweld* because it is common ownership which provides, and guarantees, the identity of interest which makes a Sherman Act "conspiracy" legally impossible. 104 S.Ct. at 2742.[10]

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[9]The NFL clubs share certain revenue streams but not others. There are significant differences among the clubs in terms of net annual profits, which are not shared.

[10]The *Copperweld* majority carefully limited its holding to a parent and its *wholly* owned subsidiary. The NFL, with its separately owned and operated clubs, lies at the opposite end of the continuum.

II.

THE RULE OF REASON WAS PROPERLY APPLIED BY THE TRIAL COURT

The NFL's legitimate interest in cooperating to produce games is fully accommodated by use of the Rule of Reason. Petitioner's only cavil concerning the manner in which the Rule of Reason was applied in the trial court relates to the issue of relevant product market.[11] According to the NFL, respondents failed to place sufficient evidence before the jury on this question. That the NFL should suggest to this Court that it review routine questions of sufficiency of evidence, particularly those already passed upon by the Court of Appeals, speaks eloquently of the absence of any issue warranting grant of *certiorari*.

The decision below selectively reviews some of the relevant market evidence placed before the jury, but its description is by no means exhaustive of the evidence presented to the jury to show that NFL games have no close substitutes.[12]

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[11]Respondents contended that the relevant market was major league professional football, while petitioners argued that the market consisted of all forms of entertainment and recreation. The trial court's instructions to the jury carefully described both the concept itself and the criteria for deciding the relevant market issue. 32 Tr.2d 7212-15.

[12]*E.g.*, 14 Tr.2d 2550 (Rozelle testimony as to essential differences among professional sports); Px 365 (Commissioner Bell's testimony on Rule 4.3 as device to protest NFL owners); 13 Tr.2d 2322 (Rozelle testimony to same effect); 13 Tr.2d 2331; 15 Tr.2d 2722-74; 2796-98 (exclusive territories vital to NFL owners); Px 367 (local competition for NFL owners consists of other NFL teams); Px 363 (Rozelle testimony that NFL is a monopoly). 13 Tr.2d 2476 (NFL team gives community unique national status); Px 48 (motion pictures and commercial sports in different markets); Px 51, page IV-11 (college football does not compete with NFL); 28 Tr.2d 6082-83 (college football has different fan base).

Relevant market is peculiarly a fact issue for the jury, one presenting no question which would warrant grant of *certiorari*. *International Boxing Club v. United States*, 358 U.S. 242 (1959); *Pinder v. Hudgins Fish Co., Inc.*, 570 F.2d 1209, 1219-20 (5th Cir. 1978); *Acme Precision Products, Inc. v. American Alloys Corp.*, 484 F.2d 1237 (8th Cir. 1973).

Moreover, judicial experience in this area overwhelmingly supports respondents' contention that NFL football has no close substitutes. This Court need look no further than its own finding last term that college football is a unique product. *NCAA, supra*, at 2966. *See International Boxing Club v. United States*, 358 U.S. 242 (1959) (relevant market is *championship* boxing); *Hecht v. Pro Football, Inc.*, 570 F.2d 982, 988 (D.C. Cir. 1977), *cert. denied* 436 U.S. 956 (1978) (relevant market is professional football); *American Football League v. NFL*, 205 F.Supp. 60, 65 (D.C.Md. 1962) *aff'd.* 323 F.2d 124 (4th Cir. 1963) (market is major league professional football); *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, 351 F.Supp. 462, 501 (E.D. Penn. 1972) (relevant market is major league professional hockey); *Fishman v. Wertz*, 1981-2 Trade Reg. ¶ 64,378 (N.D. Ill. 1981) (NBA basketball is a separate product market).

Ironically, in *Coniglio v. Highwood Services, Inc.*, 495 F.2d 1286 (2d Cir. 1974), *cert. denied* 419 U.S. 1022 (1974), the *plaintiff* argued for a "general entertainment market", while the *NFL* contended that there were no competitors to the presentation of NFL games. The court agreed with the NFL, rejecting the "entertainment market" concept as "so broadly defined as to render that concept [relevant market] all but meaningless . . .". *Id.* It is that meaningless "entertainment" market which the NFL advocated in the courts below.

Moreover, in the unique circumstances of this case, relevant market was not critical to the analysis required to

condemn Rule 4.3.[13] A division of territories completely eliminates *all* forms of competition, be it price, output, quality or any other form competition might take. "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement'. *Professional Engineers,* 435 U.S. at 692, 98 S.Ct. at 1365." *NCAA, supra* at 2965 (footnote omitted).[14]

III.

OAKLAND'S VENUE ARGUMENTS ARE BOTH FACTUALLY AND LEGALLY UNSOUND

Oakland persistently argued below that a change of venue was required because of pretrial publicity. Its position was rejected because it failed "to show anything beyond the slightest speculation that publicity infected the fairness of the trial". Court of Appeals' opinion, Oakland Appendix A, 32a. Now Oakland has entirely abandoned its publicity argument, and its seeks *certiorari* on the basis of two throwaway arguments rejected by every judge to have considered them, including the dissent below. *Id.,* 50a - 51a.

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[13]The NFL has never seriously argued that Rule 4.3 promoted competition with other products. Instead the NFL has argued that Rule 4.3 is "inherently" procompetitive because it is needed for the very existence of the league. This claim can be evaluated based upon evidence of the nature and function of the NFL itself, without reference to relevant market.

[14]Oakland's petition quibbles over the trial court's refusal to give a "public service" instruction. Even leaving to one side the dubious factual premise that football has public service aspects comparable to the professions, this Court has emphasized that such considerations play no role in a Rule of Reason analysis. *National Society of Professional Engineers v. U.S.,* 435 U.S. 679 (1978); *NCAA, supra* at 2960-61, N. 23.

At the outset it must be stressed that a change of venue is committed to the broad discretion of the trial judge, who is best situated to evaluate the myriad of subtle factors which bear on the ultimate determination as to whether the jury was impartial. *Holt v. United States*, 218 U.S. 245 (1910); *Spies v. State of Illinois*, 123 U.S. 131 (1887).

Indeed the Court has found a violation of due process in criminal cases only where defendant demonstrated actual prejudice or, in a limited number of extreme instances, in a "trial atmosphere that had been utterly corrupted by press coverage". *Murphy v. Florida*, 421 U.S. 794, 798 (1975).

Oakland's due process claim admittedly makes no effort to show actual prejudice, nor could it do so in the face of the trial court's "thorough cautionary actions" and the truly extraordinary *voir dire* process. Court of Appeals' decision, Oakland App. A, 32a.[15] Instead, Oakland contends that juror bias should automatically be inferred because some of the jurors resided in Los Angeles County and because *defendants* chose to exclude "football fans" from the jury. Neither contention has sufficient merit to justify this Court's attention.

A. Financial Bias of The Los Angeles Jurors.

Four of the eight jurors resided outside of Los Angeles County[16] and owned no property in Los Angeles County. Even as to the Los Angeles jurors, Oakland's argument is

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[15]Solely to accommodate the defendants' professed concerns, the trial court administered a 48-page questionnaire prepared by the NFL, gave each side ten instead of the normal three peremptory challenges, dismissed for cause virtually every juror challenged by defendant (2 Tr.2d 63-134) and conducted an individual interview process which required seven full days. 2 Tr.2d - 9 Tr.2d.

[16]The Central District draws jurors from a population of 12,000,000 in seven counties. Several of the jurors resided 200 miles from the location of the Coliseum in downtown Los Angeles.

fictitious: the testimony showed that the Coliseum Commission is an independent government agency which has *never* received *any* taxpayer money. *E.g.*, 16 Tr.2d 3181. Contrary to Oakland's claim, no testimony was elicited to the effect that the failure to obtain the Raiders would lead to a tax increase.[17]

The legal support for Oakland's contention is equally meager, indeed non-existent. This Court has consistently refused to impute bias to an entire class of potential jurors merely because they hold a status tangentially related to the case at bar. *Dennis v. United States*, 339 U.S. 162 (1950) *reh. denied*, 339 U.S. 950 (1950) (federal government employees not biased as a matter of law in Communist's contempt trial); *United States v. Wood*, 299 U.S. 123 (1936) *reh. denied*, 299 U.S. 624 (1937) (government employees not disqualified in criminal cases); *Smith v. Phillips*, 455 U.S. 209 (1982) (applicant for job with District Attorney not biased).

In every case claiming that a group has an indirect financial stake in the outcome, the lower courts have uniformly rejected claims of implied bias. *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976) (no basis for disqualifying St. Louis residents where indictment alleged scheme to defraud city); *City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F.Supp. 1240 (N.D. Ohio 1980) (utility customers); *Royal Indemnity Co. v. City of Erie*, 372 F.Supp. 1137

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[17]Indeed this Court can take judicial notice that the California Constitution, as amended by Proposition 13, forbids Los Angeles County from increasing property taxes. Calif. Const., Art. 13A, § 1.

Supervisor Hahn's deposition, referred to in Oakland's petition, discussed the advantages the Raiders would offer to the community in the context of refuting the NFL's principal defense at trial – that the Los Angeles political "establishment" would not support the Raider move on the terms negotiated by the Coliseum Commission. He never alluded to possible tax increases.

(W.D. Penn. 1974) (city taxpayers); *Virginia Electric and Power Co. v. Shipbuilding & Dry Dock Co.*, 389 F.Supp. 568 (E.D.Va. 1975) (utility customers); *Penn Power & Light Co. v. Gulf Oil Co.*, 270 Pa. Super. 514, 411 A.2d 1203 (1979) *cert. denied*, 446 U.S. 966 (1980).

The cases relied upon by Oakland are inapposite because none involved taxpayers disqualified because of a potential indirect interest in the litigation. *Withrow v. Larkin*, 421 U.S. 35 (1975) (no violation of due process for medical examining board to investigate and adjudicate complaint); *Commonwealth Coating Corp. v. Ohio*, 393 U.S. 145 (1968) *reh. denied* 393 U.S. 1112 (1969) (member of arbitration panel was customer of one of parties to the arbitration); *Chestnut v. Ford Motor Co.*, 445 F.2d 967 (9th Cir. 1971) (juror owned stock in defendant company). In *Tumey v. Ohio*, 273 U.S. 510 (1927), the principal authority relied upon by Oakland, the judge was disqualified because he had "a direct, personal, substantial pecuniary interest" in convicting a criminal defendant. Indeed, dicta in *Tumey* strongly imply that there is no due process issue raised by taxpayers serving as jurors in damage trial against municipalities. 273 U.S. at 528-29.

The rule Oakland seeks would require wholesale disqualification of entire classes of jurors in numerous cases because of minute and indirect interests. The Los Angeles jurors had no financial stake in the outcome merely by virtue of their status as property taxpayers.

This Court's observation in *United States v. Wood*, 299 U.S. 123, 148, is apt here:

> To impute bias as a matter of law to the jurors in question here would be no more sensible than to impute bias to all storeowners and householders in cases of larceny or burglary.

B. Representative Jury.

When Oakland raised this issue below, it claimed only that the Jury Selection and Service Act, 28 U.S.C. §1861, had been violated because there were no football fans on the jury. The argument floundered because that Act regulates a district court's own juror selection plan, *e.g., United States v. Guzman,* 337 F.Supp. 140 (S.D.N.Y. 1972), *aff'd.* 468 F.2d 1245 (2d Cir. 1972) *cert. denied,* 410 U.S. 937 (1973), not a party's own selection of jurors.

Now suddenly elevated to a "due process" claim, the contention is no less vacuous. It was the *defendants* who systematically exercised their own peremptory challenges to strike football fans from the jury. One can only speculate why the NFL did not want NFL fans on the jury. In any event, defendants cannot convert their own tactical decision into a bootstrap argument that they were denied due process.

The cases cited by Oakland all involve exclusion of a class of jurors *by court officials. Thiel v. Southern Pacific Co.,* 328 U.S. 217 (1946) (court clerk and jury commissioner excluded wage earners); *Groppi v. Wisconsin,* 400 U.S. 500 (1971) (state law prohibited change of venue); *Peters v. Kiff,* 407 U.S. 493 (1972) (jury list excluded blacks).

A claim of violation of the "fair cross-section" requirement necessitates proof of three elements: 1) the group alleged to be excluded must be a "distinctive" group in the community; 2) the representation of this group in venires from which juries are selected must be shown to be unfair and unreasonable in relation to the number of such persons in the community; and 3) this under-representation must be due to systematic exclusion of the group in the court's jury selection process. *Duren v. Missouri,* 439 U.S. 357, 364-68 (1979). Oakland has not sought to shoulder any of these three burdens, nor could it do so.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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No. 84-406
No. 84-418

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NATIONAL FOOTBALL LEAGUE, et al.
Petitioners,

v.

OAKLAND RAIDERS, LTD. and LOS ANGELES MEMORIAL COLISEUM COMMISSION
Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL BASKETBALL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The National Basketball Association ("NBA") respectfully moves for leave to file the accompanying brief *amicus curiae*. Petitioners have consented to the filing of such a brief; respondents have not.

The NBA operates a professional basketball league organized as a joint venture for the presentation of professional basketball in particular geographic locations in the United

States. As set forth in the accompanying brief, the NBA has a vital interest in the selection of geographic locations that will enhance its ability to market and promote professional basketball and to compete effectively with other forms of public entertainment. All members of the NBA are bound by contract to operate in a designated city and to seek approval from the NBA before a franchise can be relocated.

The right of the NBA to take collective action relating to the location and relocation of its franchises has been drawn into question by the decision of the Ninth Circuit in this case. In particular, shortly after that decision, and in express reliance upon it, one of the NBA's member clubs announced that it was now free to move its franchise anywhere it chose, at any time it saw fit, and it did in fact move without NBA approval from San Diego to Los Angeles, causing substantial disruption to the NBA and resulting in major contract and antitrust litigation now pending in San Diego. That suit is but the most recent example of an explosion of litigation that has been produced by the profound uncertainty surrounding the proper application of the antitrust laws to the operation of professional sports leagues.

Petitioners will necessarily concentrate on the peculiar facts of their own case. The NBA seeks leaves to file the accompanying brief to bring to the Court's attention the NBA's own long history of litigation resulting from the confusion and unpredictability as to the right of sports leagues to select the geographic location in which their teams will operate. Such pervasive confusion regarding a subject of national importance calls for authoritative clarification by this Court.

Wherefore, the NBA respectfully prays that its motion for leave to file the accompanying brief *amicus curiae* be granted.

Respectfully submitted,

/s/ Michael A. Cardozo

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The National Basketball Association ("NBA") submits this brief as *amicus curiae* in support of the petitions for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

The NBA operates a professional basketball league organized as a joint venture comprised of 23 members, each of which holds a franchise, granted by the NBA, for the presenta-

tion of professional basketball in particular geographic locations in the United States.[1]

The NBA is engaged in intense economic competition with other professional sports leagues as well as all other spectator sports and all forms of public entertainment for gate receipts, radio, television and cable revenue and other sources of income. All members of the NBA have a vital interest in the selection of geographic locations that will enhance professional basketball's ability to market and promote its product and to compete effectively with other forms of public entertainment.

All members of the NBA are by agreement bound by the Constitution of the NBA. Pursuant to that Constitution, each member has been granted a franchise, and has undertaken to operate a professional basketball team, in a designated city. Since its formation in the late 1940's, the NBA has always required approval by its Board of Governors before a franchise could move to another location. Nevertheless, shortly after the Ninth Circuit's decision in this case, one of the NBA's member clubs, the San Diego Clippers, announced its intention to—and in fact did—relocate its franchise to Los Angeles without seeking Board of Governors' approval. Relying expressly on the Ninth Circuit's decision, the San Diego team informed the NBA that it was now free to move its franchise anywhere it chose, at any time it saw fit, and that it would be a violation of Section 1 of the Sherman Act for the NBA *even to consider* whether or not to approve the relocation.

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1 The NBA's members are each owned and operated by one of the following entities: Atlanta Hawks Limited, Boston Celtics Corporation, Chicago Professional Sports Corporation, Cleveland Professional Basketball Company, Dallas Basketball Limited, Denver Nuggets Basketball Ltd., Detroit Pistons Basketball Company, San Francisco Warriors, Houston Rockets Professional Basketball Club, Inc., Pacers Basketball Corporation, Kings Professional Basketball Club, Inc., The Los Angeles Lakers, Inc., Milwaukee Professional Sports and Services, Inc., Meadowlands Basketball Associates, Madison Square Garden Center, Inc., Philadelphia 76ers Basketball Club, Inc., Phoenix Professional Basketball Club, Pro Basketball, Inc., Spurs Professional Basketball Limited, SDC Basketball Club, Inc., Seattle SuperSonics, Inc., Jazz Basketball Club, and Capital Bullets Basketball Club, Inc.

In the face of the $50 million damage award entered in this case by the trial court against the National Football League ("NFL")—an award which, if made against the NBA, would bankrupt it—the only prudent course available to the NBA was to schedule the Clippers' home games for the 1984-85 season in Los Angeles and to commence an action seeking a declaration that the NBA has the right, consistent with the antitrust laws of the United States, to consider, and approve or disapprove, the proposed relocation in the best interests of the League. Such an action has been commenced. An injunction directing the team to return to San Diego, as well as damages caused the NBA by the Clippers' usurpation of a valuable corporate opportunity available to all NBA members, is also sought.[2]

The Ninth Circuit has held that the NFL's rule prohibiting franchise relocation without the prior approval of three-fourths of the member clubs amounts to an agreement among independent economic competitors that unreasonably restrains trade. For the reasons outlined in the petitions and in the dissent below, this *amicus* believes the decision of the Ninth Circuit to be erroneous. Whether it is right or wrong, however, the broad contrariety of views expressed by the federal courts as to the proper application of Section 1 of the Sherman Act to the functioning of professional sports leagues has created profound uncertainty with respect to the ability of such leagues to exercise responsible business judgment in deciding upon the geographic locations in which their teams will operate. This issue affects not only the vital interests of sports leagues, but concerns as well the interests of states, municipalities, taxpayers and consumers throughout the country and presents a classic occasion for authoritative resolution by this Court.

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2 *National Basketball Association* v. *SDC Basketball Club, Inc. and Los Angeles Memorial Coliseum Commission*, No. 84-1430-N (CM) (S.D. Cal. filed June 15, 1984).

ARGUMENT

THE QUESTION PRESENTED IS OF NATIONAL IMPORTANCE AND IS SHROUDED IN THE UNCERTAINTY OF CONFLICTING AND DIVERGENT LOWER COURT DECISIONS, CALLING FOR AUTHORITATIVE GUIDANCE BY THIS COURT

The petitions for a writ of certiorari demonstrate a substantial measure of disagreement among the federal courts with respect to the application of the antitrust laws to the unified action of a professional sports league and substantial ground for urging that the decision below is wrong (Petition of NFL, pp. 6-20; Petition of Oakland-Alameda County Coliseum, Inc., pp. 19-22). Joining in those submissions without repeating them, the NBA stresses the intense national interest in the subject of the relocation of sports franchises and the high cost of continued confusion and unpredictability. While we submit that the court of appeals erred in concluding that an agreement among league members designating the locations of league operations can be a conspiracy among competitors in violation of Section 1, we would stress even more urgently the need for a clear and authoritative statement of the antitrust principles applicable to such arrangements. Indeed, the decision of the Ninth Circuit itself has apparently added to the uncertainty beclouding this critical area of sports league operations.[3]

3 As we read the Ninth Circuit's decision, it confirms that the members of sports leagues jointly produce a product that competes in a broader entertainment market and it recognizes that a league may properly impose restrictions on team movement so long as the limitations are "tailored to serve the needs inherent in producing the . . . 'product' and competing with other forms of entertainment" (Opinion below, App. A to NFL Petition, p. 26a). The court went on to suggest that antitrust concerns could be eliminated by an express recognition and consideration of various objective factors governing team relocation and the creation of a procedural mechanism to ensure consideration of those factors.

Although the NBA promptly adopted the very standards and procedures outlined by the Ninth Circuit, it was met by the subsequent action of the Clippers (represented by the same attorneys appearing for one of the

The lack of guidance in the application of the antitrust laws to league decisions concerning the location of franchises has produced an explosion of litigation. The NFL's petition for certiorari notes that no fewer than eight suits have been prosecuted in federal and state courts with respect to the move of the Oakland Raiders and that at least five actions are pending as to the recent unilateral move of the Baltimore Colts of the NFL to Indianapolis. The NBA's own experience graphically illustrates that absent an authoritative resolution of the issue by this Court, sports leagues will continue to face the prospect of protracted and burdensome litigation, and potentially devastating legal penalties, whether they permit or prohibit proposed franchise relocations:

1. In 1976, the then Buffalo Braves advised the City of Buffalo, owner of the arena in which the Braves had played their NBA games, that a transfer of their franchise to Florida was planned and that approval for the transfer would be sought from the NBA. Before the NBA had taken any action at all, the City of Buffalo filed suits in Buffalo state and federal courts seeking an injunction to prevent the NBA from authorizing any relocation out of Buffalo and $64 million in damages for alleged violations of the Sherman Act.[4] The suit, in which the plaintiff obtained a temporary order restraining any move, was discontinued only after the Braves withdrew their 1976 proposal to relocate the franchise.

2. In 1979, the NBA approved the transfer of the New Orleans franchise to Salt Lake City. The team had enjoyed little success in New Orleans and had incurred substantial

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respondents here) which moved to Los Angeles without NBA approval, contending that the Ninth Circuit's opinion supports the Clippers' view that a member of a sports league has the unfettered right to move its franchise anywhere at any time, and that *any* restriction of *any* kind on the alleged right of a team unilaterally to select the location of its games is a violation of Section 1 and subjects the league to grievous damages.

4 *City of Buffalo* v. *Atlanta Hawks*, No. 76 Civ. 261 (W.D.N.Y. filed June 15, 1976); *City of Buffalo* v. *Buffalo Braves Inc.*, No. 30407 (Sup. Ct. Erie Co. filed June 18, 1976).

losses. Nevertheless, suit was filed in a Louisiana state court by the State of Louisiana and the state agency operating the New Orleans Superdome seeking to prohibit the move and claiming $60 million in damages for alleged violations of the Louisiana antitrust laws. The City of New Orleans intervened in the action as a plaintiff. A temporary restraining order was entered prohibiting the team from playing its home games in any location outside of New Orleans. Although the NBA ultimately prevailed, it took more than four years of expensive and time-consuming litigation to defeat the damage claims.[5]

3. In June 1982, the San Diego franchise requested immediate NBA approval for a transfer of its operations to Los Angeles. Less than three weeks later, the NBA Board of Governors voted to table the matter, pending a full investigation of whether the proposed transfer would best serve the interests of the NBA. The NBA was promptly sued in Los Angeles federal court by the San Diego team,[6] which alleged that the mere consideration of its request by the NBA was a violation of the antitrust laws and that the NBA's failure to grant immediate, unquestioning approval had caused damages to the team in excess of $100 million. At the same time, the NBA was sued in a California state court by two of the San Diego team's season ticket holders, who claimed that the NBA would be in violation of the antitrust laws if it *did* approve the transfer.[7] The NBA was also threatened with suit by the City of

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5 *HMC Management Corporation* v. *The New Orleans Basketball Club*, 375 So.2d 700 (La. App. 1979). *See also County of Nassau* v. *Long Island Sports Enterprises, Inc.*, (Sup. Ct. Nassau Co. unfiled), seeking relief because of the move of an NBA team from New York to New Jersey; *D.H. Holmes Co.* v. *The New Orleans Jazz*, No. 79-11309 (Civil Ct. Parish of Orleans filed July 30, 1979), seeking damages allegedly incurred by a ticket agency because the NBA allowed the New Orleans team to move to Utah.

6 *Los Angeles Memorial Coliseum Commission and SDC, Inc.* v. *National Basketball Association*, No. 82-3165-CBM (Gx) (C.D. Cal. filed June 24, 1982).

7 *Pancer* v. *Sterling*, No. 487979 (Super. Ct. Cal. filed June 18, 1982).

San Diego and the corporation that owned the San Diego Sports Arena if it approved the relocation. In anticipation of this barrage of litigation from all sides, the NBA itself commenced a declaratory judgment action, seeking guidance from the federal court in San Diego as to the action the NBA could lawfully take.[8] The firestorm of legal activity ended only when the San Diego franchise abandoned its request to move. This respite, however, was short lived as the NBA was once again plunged into litigation when the Clippers announced in May, 1984 that it was moving to Los Angeles without seeking approval of the NBA Board of Governors.[9]

The ability to make responsible judgments about team location is fundamental to the operation of professional sports leagues. Yet the present uncertainty as to the reach of the antitrust laws has rendered sports leagues powerless to act on questions of franchise relocation without subjecting themselves to plainly unacceptable legal risks. This pervasive confusion regarding a subject of national importance calls for authoritative clarification by this Court.

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8 *National Basketball Association* v. *SDC Basketball Club, Inc.*, No. 820743-N (I) (S.D. Cal. filed June 22, 1982).

9 See n. 2 *supra*.

CONCLUSION

The petitions for a writ of certiorari should be granted.

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Nos. 84-418, 84-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

OAKLAND-ALAMEDA COUNTY COLISEUM, INC.,
Petitioner,

v.

OAKLAND RAIDERS, LTD., AND
LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

NATIONAL FOOTBALL LEAGUE, ET AL.,
Petitioners,

v.

OAKLAND RAIDERS, LTD., AND
LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents

BRIEF FOR THE MAYOR AND CITY COUNCIL OF BALTIMORE AS AMICUS CURIAE SUPPORTING PETITIONERS

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BRIEF FOR THE MAYOR AND CITY COUNCIL OF BALTIMORE AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE AMICUS CURIAE

The Mayor and City Council of Baltimore ("Baltimore") is a political subdivision of the State of Maryland.[1] Baltimore is the designated "home territory" of the Baltimore Football Club, Inc., according to the Constitution and By-Laws of the National Football League

[1] This amicus curiae brief is filed pursuant to Supreme Court Rule 36.4.

("NFL"). The Baltimore Football Club, Inc. ("Club"),[2] known as the "Baltimore Colts," played its home games in Baltimore from 1947 until the end of the NFL's 1983-84 season. Throughout that period of time, Baltimore provided for the Club and other lessees the myriad services required to operate a stadium.

In the late evening of March 28, 1984, despite public statements promising that the Baltimore Colts would not leave Baltimore, the Baltimore Football Club, Inc., relocated some of its tangible property to Indianapolis, Indiana, and held itself out as the "Indianapolis Colts" team. The Club is currently playing its home games in Indianapolis' Hoosier Dome.

Baltimore has filed an action to condemn the franchise which was granted to the Club by the NFL.[3]

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[2] Baltimore Football Club, Inc., is a member of the National Football League, and a petitioner here.

[3] *Mayor and City Council of Baltimore v. Baltimore Football Club, Inc.*, No. B84-1294 (D. Md.). The Club has attempted to interplead Baltimore's action with the "claims" of the Capital Improvements Board of Marion County under the Board's lease with the "Indianapolis Colts." *Indianapolis Colts v. Mayor and City Council of Baltimore*, No. IP 84-652-C (S. D. Ind.), *stay of injunction issued*, 733 F.2d 484 (7th Cir.), *application for order vacating stay denied*, No. A-1014 (U.S., June 14, 1984), *order granting injunction rev'd*, No. 84-1649 (7th Cir., August 10, 1984). The Club has filed an action pursuant to 42 U.S.C. 1983, *Indianapolis Colts v. Mayor and City Council of Baltimore*, No. B84-2560. The bankruptcy petition filed against the Club in the United States District Court for the District of Maryland, Bankruptcy Unit, has been dismissed. *In re Baltimore Football Club, Inc.*, No. 84-B-0528 (D. Md.).

REASONS FOR GRANTING THE WRIT

I. Nature of the National Football League's Restraint.

This case[4] originated from the desire of the Oakland Raiders football team to relocate to the Los Angeles area, despite Oakland's unflagging commitment to the Raiders for more than fifteen years. In the words of Edward Bennett Williams, owner of the Baltimore Orioles, "Teams are held in trust for the cities where they function."[5] The special status which is accorded to professional sports teams is derived in part from the predictable way in which

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[4] Baltimore is filing this brief amicus curiae in support of the petition for writ of certiorari filed by the National Football League ("NFL") and the petition of Oakland-Alameda County Coliseum, Inc., ("Oakland"), with respect to questions three, four and five presented therein. The third question presented by Oakland is stated:

> "Whether under a rule of reason analysis in an action by a member team against a sports league under Section 1 of the Sherman Act, the jury is precluded from considering public interest factors that indirectly promote competition in assessing any competitive impact of league controls of franchise locations."

Petition for a Writ of Certiorari, *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381 (9th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3242 (October 2, 1984) (No. 84-418) (the "Oakland Petition"). The fourth question in the Oakland Petition is stated:

> "Whether under a rule of reason analysis in an action by a member team against a sports league under Section 1 of the Sherman Act, the jury is precluded from considering the pro-competitive benefits in the local market abandoned by the team seeking to move and may only consider the asserted pro-competitive benefits in the local market to which the team seeks to move."

The public interest and local pro-competitive questions are addressed here in Section II. The fifth question presented in the Oakland Petition is addressed jointly in Section I with the singular question presented by the NFL.

[5] *Profession Sports Antitrust Immunity*, Hearings Before the Committee on the Judiciary of the United States Senate, 97th Cong., 2d Sess., at 224 (Statement of the Honorable William Donald Schaefer, September 16, 1982).

teams within the league are allowed to operate. The NFL controls various aspects of the conduct of member teams, especially the element at issue here — the prohibition against relocating a team except as provided by the NFL's Constitution and By-Laws.

The provision in the NFL's Constitution which controls the relocation of franchises requires that a team contemplating relocation receive prior "approval by the affirmative vote of three-fourths of the existing member clubs of the League." NFL Constitution and By-Laws, Section 4.3; Petition for a Writ of Certiorari, *Los Angeles Memorial Coliseum Commission v. National Football League,* 726 F.2d 1381 (9th Cir.), *petition for cert. filed,* 53 U.S.L.W. 3242 (October 2, 1984) (No. 84-406) (the "NFL Petition") at p. 3. Such a provision is essential to the proper operation of the league, which is an industry providing profound economic and collateral benefits to its "designated cities."[6]

Baltimore believes that the NFL's right to designate a "home territory" pursuant to its Constitution and By-Laws, and its obligation to allow the relocation of any franchise only as set forth therein, are essential to the continued existence of professional football. It is only through the League's regulation of its members that fans develop the level of interest and enthusiasm in professional football which justifies the commitment of public resources to the sport. Without the expenditure of public money to finance stadia and the services which the exhibition of public events requires, professional football would never have existed in Baltimore.

Retaining the status of a "designated city" imposes considerable burdens on the city or locale which benefits

[6] An NFL member "holds a franchise from the League to operate a professional football club in a *designated city*" NFL Constitution and By-Laws, Section 3.4 (Emphasis supplied).

from the presence of an NFL franchise. The city must provide suitable accommodations for its team, and provide a full complement of support services to ensure that the public is adequately protected.

The construction and maintenance of a stadium constitute a substantial commitment of public resources. The cost is borne by patrons in the form of admission taxes, and by taxpayers in the form of debt service on bonds. For example, Baltimore's first stadium was financially unsuccessful and considered a civic extravagance for many years after its construction in 1922. *Memorial Stadium: Interim Report of Progress,* Jewell, Downing and Associates (1983) at p. 5. The present Memorial Stadium was completed in 1954, and was financed through bond issues. In the past four fiscal years, the state of Maryland and Baltimore have allocated more than seven million dollars for capital improvements to the stadium. Further, research has shown that as many as 42% of Maryland residents may visit Memorial Stadium in a given year. *Ibid.,* p. 8.

The opinion of the Court of Appeals affirmed the district court's rejection of NFL's single entity and ancillary restraint defenses. *Los Angeles Memorial Coliseum Commission v. National Football League,* 726 F.2d 1381 (9th Cir. 1984). The key reason why the NFL's ancillary restraint defense was rejected is that the court thought that local governments should be capable of protecting themselves through the leases negotiated with member clubs. *Los Angeles Memorial Coliseum v. National Football League,* 726 F.2d at 1397; NFL Petition at 25a-26a. Baltimore's experience has disproved that notion.

Preservation of the NFL's authority to regulate the transfer of franchise is an important aspect of preserving the reason for investing in local sports teams. Market forces do not and will not set the terms of stadium leases

so that local governments are able to obtain reasonable financial protection for their investment. The economic burden of funding the construction of a stadium is profound. In Oakland's case, the stadium authority issued sixty million dollars in bonds, with payments extending to the next century. Oakland Petition, p. 3. In Baltimore's case, the State of Maryland had considered and approved a twenty-two million dollar package to renovate Baltimore's Memorial Stadium before the Colts slipped their reins. Additionally, Baltimore has required that concessionaires in the stadium spend more than two million dollars to improve facilities there.

The reason why market forces will never operate freely is that there is no equivalence between the revenue generated by a stadium lease and the benefits to the community at large. An NFL franchise produces its greatest benefit to a municipality in an indirect fashion. The nature of this "industry," as it was called by Mayor William Donald Schaefer,[7] is such that lease revenue is almost negligible compared to the ripple throughout the local economy of money spent by fans enjoying NFL football.

For example, the Colts paid Baltimore for the use of Memorial Stadium according to a formula, resulting in total payments to Baltimore of $149,728.00 for the 1983-84 season. Mayor Schaefer estimated before Congress that the Colts generated about twenty million dollars [per year] in economic benefit to Baltimore City.[8] Of course, this effect is very diverse, and it strengthens

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[7] *Profession Sports Antitrust Immunity,* Hearings Before the Committee on the Judiciary of the United States Senate, 97th Cong., 2d Sess. 225 (Statement of the Honorable William Donald Schaefer, September 16, 1982).

[8] *Ibid.*

segments of the economy ranging from payroll taxes for governments to patronage at restaurants and hotels.

Net Profit or (Loss) from the Operation of Memorial Stadium for the Benefit of the Baltimore Colts, by Fiscal Year

Fiscal Year	Lease Payments	Amusement/ Admissions Tax Receipts	Operational Costs [3]	Net Profit (Loss)
1984 [1]	$149,728.00	$399,988.00	$596,948.00	($ 47,222.00)
1983	$ 23,760.00 [2]	$163,804.00	$568,675.00	($381,111.00)
1982	$143,880.00	$378,369.00	$542,351.00	($ 20,102.00)

1. Baltimore's 1984 Fiscal Year begins July 1, 1983, and ends June 30, 1984.
2. Lease payments were significantly reduced by the NFL players' strike.
3. These costs do not reflect depreciation, renovation or replacement of the structure itself.

It is readily apparent that the rental paid to Baltimore pursuant to its lease with the Club represents only three-quarters of one percent of the total economic impact which the franchise had upon the City of Baltimore. It is impossible for a municipality to protect the varied and diverse economic interests of its inhabitants through the mechanism of a stadium lease. The inducement for a franchise to remain in a designated city is usually subsidized rental payments in exchange for the expectation of the continued presence of the team, and the panoply of benefits which flow therefrom. Damages at law against a defaulting or absconding franchise for breach of the lease agreement would return only a small fraction of what the local community lost.

Furthermore, the position that long-term leases afford cities the protection which their investments demand is not itself without risk of antitrust liability. Apart from undermining the ability of public authorities to rely on *league* agreements concerning the location of teams, the decisions below have other sweeping implications for public authorities in their dealings with individual teams. If, as the Court of Appeals held, agreements that limit the ability of stadia to secure tenants may unlawfully restrain competition in a stadium market irrespective of the volume of commerce involved (726 F.2d at 1394), then the

Court of Appeals' reasoning raises serious questions as to the validity of long-term stadium lease agreements between stadia and professional teams. Such agreements involve, by definition, stadia that are competitors of other stadia in such a market, and such agreements restrain competition among stadia in the same manner as the NFL's location agreement found unlawful in this case. Indeed, the Ninth Circuit itself has already held long-term stadium concession contracts to violate the Sherman Act. *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1303-05 (9th Cir. 1982). *See also Hecht v. Pro Football, Inc.*, 570 F.2d 982, 996 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 956 (1978) (stadium lease provision may violate Sherman Act although used for sound business reasons). The Court of Appeals thus ignored the evident implications of its own holdings in suggesting that long-term stadium leases will adequately protect local governments in the absence of a league say on team location matters.

II. "Rule of Reason" Analysis Under the Sherman Act Must Include considerations of Public Interest.

The Court of Appeals declined to find that Section 4.3 of the NFL's Constitution and By-laws was a *per se* violation of the Sherman Act, 15 U.S.C. section 1. The court's decision was therefore predicated upon its determination "whether [Section 4.3] reasonably serves the legitimate collective concerns of the owners or instead permits them to reap excess profits at the expense of the consuming public." 726 F.2d at 1392; NFL Petition at 16a. This was essentially the factual question presented to the jury, but without any instruction that it could consider matters of public interest, or the pro-competitive effects which would be lost by a city when a sports franchise abandoned it. Oakland Petition, pp. 12-18.

The court's assessment of the reasonableness of Section 4.3 depended, in part, on its observation that stadia are distinct economic entities, and areas or territories are not. In a rule of reason analysis, the finder of fact should consider the reasonableness of the actions complained of in light of all of the circumstances. *Arizona v. Maricopa County Medical Society,* 457 U.S. 332 (1982). The NFL correctly argued that it is places, not stadia, which compete for NFL franchises. Baltimore's experience has demonstrated that the Maryland General Assembly treats the presence of professional sports as a matter of state-wide importance, and has offered throughout the years to support sports franchises with state dollars. The Mayor and City Council of Baltimore have made every attempt to provide for sports teams and their patrons the highest quality stadium allowed by its budget.

The financing of sites for the exhibition of NFL football and the support of the teams are largely public responsibilities. The prestige associated with professional sports franchises, especially successful ones, and the direct and diffuse economic benefits are great enhancements to a city.

As set forth above, cities with existing stadia are often willing or required to subsidize the actual cost of public facilities in order to attract or retain sports franchises. Cities which lure franchises to their domain must incur profound debt to construct the sort of stadium which is attractive to franchise owners.

The condition of Baltimore's Memorial stadium was an area of controversy in the aborted negotiations between the Colts' management and Baltimore's city officials. Team owners are in a position to demand that stadia have elegantly appointed accommodations befitting the owners of multimillion dollar enterprises. The State of Maryland had undertaken to sponsor a twenty-two million dollar

bond issue to renovate its stadium, contingent upon having a 15-year lease ratified by the Colts and the Orioles. Chapter 529, Laws of Maryland (1980).[9] Had the Club left Baltimore after the 1984-85 season, and after the bond issue, the taxpayers of Maryland would have found themselves saddled with payments to improve a stadium empty for much of the year.

Certainly the public interests of the home territory of a team are to be considered in an assessment of whether actions taken to restrain a team's relocation are reasonable. Given the enormous public investment in professional sports, whether provided directly for a league's "product" or indirectly from the public treasury, precedent that public interest may not be considered under a rule of reason analysis will have a devastating effect upon every city's ties with professional sports.

This Court has found that the antitrust laws are first and foremost consumer welfare laws, designed to protect the public from the economic burdens imposed by unreasonable business agreements. When such agreements or combinations are "unresponsive to consumer preference," the likelihood increases that a violation of antitrust laws will be found. *NCAA v. Board of Regents*, ___ U.S. ___, 104 S. Ct. 2948 (1984). Where, as in the case of the National Football League, the consumer's interest is served and protected through control over franchise location and relocation, public interest considerations

[9] The period in which the leases were to be ratified was extended through June 1, 1983, by Chapter 552, Laws of Maryland (1982). The bond authorization was modified by Chapter 496, Laws of Maryland (1983), which reduced the authorized issue to $15 million, and further provided that $7.5 million may be made available upon the signing of a six-year lease by either team.

should be given great importance. The Court of Appeals' analysis fails to protect adequately the interests of the taxpayers of the abandoned designated city.

CONCLUSION

The petition for a writ of certiorari submitted by the National Football League (No. 84-406) should be granted, and the petition for a writ of certiorari submitted by the Oakland-Alameda, Coliseum, Inc. (No. 84-418) should be granted with respect to the third, fourth and fifth questions presented.

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No. 84-406
No. 84-418

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OAKLAND-ALAMEDA COUNTY COLISEUM, INC.,
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Joint Brief of Respondents Los Angeles Raiders (formerly Oakland Raiders) and Los Angeles Memorial Coliseum Commission In Reply to "Brief of Public Entities as Amici Curiae In support of Granting Writ of Certiorari", and In Reply to "Brief for the Mayor and City Council of Baltimore as Amicus Curiae Supporting Petitioners".

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Oversight Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, Ninety-Seventh Congress, First and Second Sessions, on H.R. 823, H.R. 3287, and H.R. 6467, Antitrust Policy and Professional Sports, Serial No. 114 7

No. 84-406
No. 84-418

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

vs.

OAKLAND RAIDERS, LTD., and
LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

OAKLAND-ALAMEDA COUNTY COLISEUM, INC.,
Petitioner,

vs.

OAKLAND RAIDERS, LTD., and
LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

Joint Brief of Respondents Los Angeles Raiders (formerly Oakland Raiders) and Los Angeles Memorial Coliseum Commission In Reply to "Brief of Public Entities as Amici Curiae In support of Granting Writ of Certiorari", and In Reply to "Brief for the Mayor and City Council of Baltimore as Amicus Curiae Supporting Petitioners".

As our reply to the brief of "public entities" City of San Diego and others was in printed proof, the amicus brief of Baltimore arrived. We shall refer to the brief of "public entities" as the "amicus brief" and reply to the Baltimore brief in Part III below. The amicus brief exhibits unawareness of the facts of the case, of what the issues were, and of what was decided. Its argument is reducible to two themes: (1) that cities need protection, that those named as *amici* wish to place themselves in the autocratic hands of clubowners for that protection, and that sports leagues have an interest in the location of members; and (2) that factors other than competition should override the Sherman Act.

I. First Theme: Supposed Need of Protection of Cities to Be Vested in the League, Not in Free Competition.

The *amicus* brief asks (p. 1) how cities can protect their investments in stadia and the like. The court below gave the answer in its opinion: "through the leases they negotiate with the teams for the use of their stadia" (p. 26a of Petition in No. 84-406). Indeed, the *amicus* brief reveals (p. 6) that many cities have leases of terms for as long as 30 years. The opinion below also observes (at same page) how precarious is protection placed in the clubowners' hands.[1] But, in any event, however differently the particular cities lining up as *amici* may feel, the Sherman Act commands that protection be vested in the free competitive operation of the market, not in cartelized hands.[2]

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[1]Several of the *amici* cities obtained football clubs by attracting them away from others. San Diego took the *Chargers* from Los Angeles, and Irving, Texas, took the *Cowboys* from Dallas. In baseball, which is not subject to the Sherman Act and where the leagues are free to "protect" the cities, San Diego took its baseball club, the Padres, from Washington, D.C., Atlanta took its club from Milwaukee, and Oakland took its from Kansas City.

[2]Notably absent from the list of cities joining in the *amicus* brief are Anaheim, which obtained the Rams from Los Angeles by free

When the *amicus* brief speaks (p. 1) of "willy-nilly relocations", it is not looking at *this* case (except so far as the removal of the Los Angeles Rams from Los Angeles to Anaheim, with the approval of NFL, was a "willy-nilly" relocation). After remaining in one location for two decades, the Raiders had to move to Los Angeles because the Oakland stadium had become too small and out-of-date to produce the revenue needed for a club to be competitive with the other clubs in the '80s.[3]

In its contention that a sports league has an interest in the location of its members, the *amicus* brief ignores the fact that the present case has nothing whatever to do with a rule stating objective standards about relocation, impartially applied.[4] And when *amici* assert (p. 9) that "strict standards" should not be applied to the sports area, they ignore the fact that "strict standards" were not applied in this case; the case went to the jury for decision on the Rule of Reason under a set of instructions remarkably generous to NFL.[5]

Amici's contention (p. 3) is that "the NFL's franchise location rule . . . cannot as *a matter of law* violate Section 1 of the Sherman Act". That, it will be noted, is at the opposite pole from a contention that the NFL rule cannot be declared illegal as a matter of law. It is a contention that as a matter of law the rule cannot be held illegal at all, even though, as here, it is found by the fact-finder to be

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competition, and Los Angeles, which obtained a replacement by the free competition permitted by the decision in this case.

The operation of free competition has given several of the *amici* cities football clubs in the new U.S. Football League, *viz.*, Oakland, Pittsburgh, New Orleans, and Tampa.

[3]See p. 5 of Raiders' brief in No. 84-406. Raiders left Oakland only after expiration of their lease.

[4]See pp. 12, 13 of Raiders' brief in No. 84-406.

[5]See pp. 10, 12 of Raiders' brief in No. 84-406, and pp. 5, 6 of Raiders' brief in No. 84-418.

an unreasonable restraint of trade. Nor do *amici* explain by what reasoning the NFL rule is exempt from antitrust analysis. Cut from the same cloth is the assertion by *amici* that the decision in this case against NFL's relocation rule "ignored the fact that league policies favoring franchise stability have . . . pro-competitive effects" (p. 9). But the issue whether the NFL rule involved in this case and as here applied was pro-competitive or anticompetitive was put to the jury, the fact-finder, and it found that it was anticompetitive, that it had nothing to do with "stability". One allied product of gratuitous fantasy is *amici's* statement (p. 9) that NFL's decision "to maintain the Raiders' operations in Oakland was motivated by the belief that such a decision served league interests". On a mass of evidence, the jury found that decision to be arbitrary, in violation of the obligation of good faith and fair dealing, inspired by animosity and the selfish interests of various clubs, and not by any legitimate league interest.[6]

Because the *amicus* brief (p. 8) summons to its aid an anonymous editorial in a newspaper,[7] we adopt as part of our argument the words of a person whom NFL's petition (in No. 84-406, p. 7) includes among qualified "economists and commentators", Mr. L. Koppett. In an article in *The Sporting News* of February 14, 1981, entitled "Raiders Move No Blow for Anarchy", Mr. Koppett wrote that if NFL's specific relocation rule were adjudicated to be illegal

> "[t]he league would simply have to adopt a new rule, more compatible with the antitrust laws, for future cases.
>
> "This has already happened with respect to the college draft and the Rozelle Rule (about compensation

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[6]See pp. 6-7 of Raiders' brief in No. 84-406.

[7]*USA Today*, until recently an affiliate in the Gannett chain of the Oakland *Tribune*, hardly an impartial observer.

for a free agent who changes teams). The old rules the NFL had on these points were found to be illegal under the antitrust laws, several years ago, in several lawsuits.

"The league had to create more suitable rules, which the courts then approved.

"At the time, we heard the same cries from the NFL commissioner, its lawyers and most club owners that 'the game as we know it' would be hopelessly wrecked if the old, restrictive draft and reserve rules were weakened. But the last time I looked, the draft was still in existence, the NFL was boasting about setting attendance records in 1980, television income was at an all-time high and most players were reporting for work at the right time and actually following the instructions of their coaches.

"So a Raiders move to Los Angeles, if permitted by the courts, will be serious enough to those involved, but hardly the signal for bloody revolution on the pro football front."

II. Second Theme: Appeal to Factors Unconnected with Competition.

The *amicus* brief asserts (p. 2) that "the courts below failed to give due consideration to the equally important 'investment' of community spirit and pride in local sports teams" and that the antitrust laws were not "intended to frustrate or undermine the public interest". So far as any notion about competition is embodied in the word "public interest", it *was* given to the jury to consider. So far as the words "public interest" relate to factors not connected with competition, they lie outside the antitrust law.[8] If they are to supplant the antitrust considerations made

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[8]See pp. 4, 5 of Raiders' brief in No. 84-418.

paramount by the Sherman Act, only Congress may say so. And, as for the suggestion by *amici* (p. 1) that the City of Oakland relied on some commitment that the Raiders would stay in Oakland, given when the Oakland stadium was built, it is contrary to a finding implicit in the jury verdict that there was no such reliance.

Amicus brief says nothing not said at greater length in the petitions in 84-406 and 84-418. Amici's reliance on *Copperweld Corp. v. Independence Tube Corp.*, ... U.S. ....., 81 L.Ed.2d 628, 104 S.Ct. 2731 (1984), and on Justice Rehnquist's dissent from denial of certiorari in *National Football League v. North American Soccer League*, 459 U.S. 1074 (1982), is answered in our brief in No. 84-406, at pp. 17-20.

Amici (p. 2) argue that consideration should not be focused on "sports competition among the NFL teams" but on an "economic competition among different sports and between sports and other entertainment". But the trial court put to the jury the question of what constituted the "relevant market" and called to its attention NFL's contention that the relevant market was the entire field of entertainment. The jury rejected that claim.[9]

III. Reply to Amicus Brief of Baltimore.

Our reply to Baltimore may be short: It raises no issues under the Sherman Act.

Baltimore's first argument is that long-term stadium leases are not sufficient protection to a city, because the tenant may breach the lease and the damages may not be reparable by a money award. The answer is obvious: A city so circumstanced may sue for and obtain an injunction under state or common law, as was done by New York in *City of New York v. New York Jets Football Club, Inc.*, 394 N.Y.S.2d 799 (1977).

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[9]See pp. 18, 19 of Raiders' brief in No. 84-406.

We do not know how accurate is Baltimore's description of its relation to the *Colts* and of its reliance and dependency on the *Colts*. But it is not true of Oakland and the Raiders, as we pointed out in our brief in response to the petition in No. 84-418 (at p. 4).

Baltimore's second point is the same one about "public interest" factors answered at pages 4 and 5 of our brief in No. 84-418.

Baltimore's appeal is simply one that should be addressed to Congress. Indeed, the same arguments *were* presented to Congress by the Mayor of Oakland and its counsel and by Congressmen from the area where Oakland is located.[10]

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[10]See pages 348-353, 408-422, 608-620 of Oversight Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, Ninety-Seventh Congress, First and Second Sessions, on H.R. 823, H.R. 3287, and H.R. 6467, Antitrust Policy and Professional Sports, Serial No. 114.

CONCLUSION

The list of *amici* cities is simply part of NFL's whipped-up publicity claque so active in the media and in lobbying in Congress and adds nothing to the case. We respectfully submit that neither *amicus* brief adds any intellectual content to the attempt to obtain a review by this Court and that the petitions should be denied.

Dated: October 18, 1984

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REPLY BRIEF FOR NATIONAL FOOTBALL LEAGUE PETITIONERS

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REPLY BRIEF FOR NATIONAL FOOTBALL LEAGUE PETITIONERS

This Court should resolve the uncertainty that prevails as to the application of Section 1 of the Sherman Act to the internal operations of professional sports leagues. That uncertainty is of serious concern not only to leagues, teams, and the general public but also to public authorities with a heavy financial stake and community interest in league operations. That uncertainty plainly troubled the majority below, which resolved the dilemma it admittedly faced by treating the NFL members as economic competitors—while acknowledging they were not—based upon decisions of this Court that have since been overruled.

I. THE SINGLE ENTERPRISE ISSUE SHOULD BE RESOLVED BY THIS COURT

Both respondents assume the answer to the question that requires resolution by this Court. Both presume that the NFL members "compete economically" and are business competitors

of each other. Coliseum Br. 1; Raiders Br. 7. Yet the critical question in this case is whether the members of a professional sports league are independent economic competitors or whether they are engaged in a common enterprise to produce and present jointly a single product? If the latter, agreements among them governing the location of the enterprise do not join together previously independent sources of economic power and, accordingly, do not constitute concert of action under Section 1 of the Sherman Act.

The courts below concluded that the NFL members "are not true competitors, nor can they be" (15a) and are not within "the traditional competitive mold." (81a-82a.) Nonetheless, both courts held, as a matter of law, that since each NFL member is a separate *legal* entity, the League location agreement was a conspiracy among independent economic competitors within the ambit of Section 1. (9a-10a, 54a-55a.) In doing so, both courts treated as dispositive this Court's intra-enterprise conspiracy decisions that were "disapproved and overruled" in *Copperweld Corp.* v. *Independence Tube Corp.*, 104 S. Ct. 2731, 2745 (1984). Despite extensive evidence as to the nature of the League and its functioning, the conspiracy issue was taken from the jury and a verdict directed for respondents.[1]

Neither respondent defends the actual holdings and analysis of the courts below on this issue. Neither even mentions the now-overruled decisions in *Perma Life Muffler, Timken Roller Bearing, Kiefer-Stewart,* or *Yellow Cab.*[2] Despite *Copperweld's* mandate that Section 1 bars collective action only among entities that "previously pursued their own interests

[1] The majority below acknowledged that there are "*persuasive reasons for recognizing the NFL as a single entity*, [but] we do not find these reasons so compelling that existing precedent can be ignored . . " (13a) (emphasis supplied.) That "precedent" was, of course, overruled in *Copperweld.*

[2] See 392 U.S. 134 (1968); 341 U.S. 593 (1951); 340 U.S. 211 (1951); 332 U.S. 218 (1947). Respondents' attempt to write off *Copperweld* as irrelevant stands in sharp contrast to the heavy reliance they placed upon the cases that were overruled in *Copperweld.* Both in the District Court and in the Court of Appeals those four cases received top billing in respondents' briefs and arguments.

separately," respondents ignore the Ninth Circuit's acknowledgement that the "NFL teams are not true competitors." (15a.) [3]

Rather than defend the Ninth Circuit's holding,[4] respondents maintain that "the mere fact of separate ownership is sufficient to remove the NFL clubs from the ambit of *Copperweld.*" Coliseum Br. 13; Raiders Br. 19-20. That position cannot be sustained in light of *Copperweld* itself, where this Court emphasized that the "appropriate inquiry" is whether "the logic underlying Congress' decision to exempt unilateral conduct from Section 1 scrutiny" excludes from Section 1 the conduct under review. 104 S. Ct. at 2731.

Congress' logic—that "subjecting a single firm's every action to judicial scrutiny for reasonableness" would "discourage" the productivity and efficiency goals of the antitrust laws (*id.* at 2744)—was ignored by both courts below, despite the fact that it squarely applies to the internal arrangements of a professional sports league. Those arrangements serve to *create* a product—here, NFL football—that, in the absence of such arrangements, could not exist at all. Because they serve to *encourage* production and thereby to satisfy consumer preferences, such internal arrangements are fundamentally different from the condemned agreements of independent *competing* producers. The latter agreements "suddenly bring together economic power that was previously pursuing divergent goals" (*id.* at 2731), and thereby disserve society's interest in pre-

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[3] The Raiders err in asserting that the NFL had no reasonable basis on which to disapprove the Raiders' move. Raiders Br. 13. The Raiders were among the top three most successful and profitable League members with unparalleled support from the team's existing community. Characterizations of the supposed advice of NFL legal counsel (Raiders Br. 4) also fundamentally misdescribe the record.

[4] Respondents get no help from Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979). Unlike the situation in *Broadcast Music,* where the defendant class of "composers ha[d] numerous markets and numerous incentives to produce" (441 U.S. at 22), the NFL clubs simply cannot produce individually their collective product. In any event, the issue of defendants' capacity to conspire was not presented in *Broadcast Music.*

serving competition as a means of encouraging productivity and efficiency. Accordingly, *Copperweld* held that *only "entities that previously pursued their own interests separately"* can "conspire" in violation of Section 1. *Id.* at 2741 (emphasis added). The Court of Appeals' majority, writing before *Copperweld*, recognized that "the NFL teams are not true competitors," and thus essentially acknowledged that their internal decisions are embraced by "the logic underlying Congress' decision to exempt unilateral conduct from Section 1 scrutiny."

Moreover, the formalistic premise of respondents' illusory *Copperweld* distinction—that the NFL member clubs are not commonly owned—misses the mark, for professional sports leagues are enterprises owned in common by the league members. The principal asset and source of revenue for every league member is the *league* product created by all members "as co-producers of a common entertainment product . . . ." *WTWV, Inc.* v. *National Football League*, 678 F.2d 142, 144 (11th Cir. 1982). The joint production of NFL football entertainment gives every member club a property right in the League product. *National Football League* v. *Governor of Delaware*, 435 F. Supp. 1372, 1377 (D. Del. 1977), applying *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-76 (1977). Accordingly, each member's right to control certain common matters, such as where the League itself will operate, is based not on *agreement* between competitors but on each member's pro rata *ownership* interest in the League enterprise.

The Ninth Circuit's departure from "the logic underlying Congress' decision to exempt unilateral conduct from Section 1 scrutiny" presents a compelling case for this Court's review. For in addition to fostering further confusion as to the location of league members (Pet. 6-14), the decision below puts in question a wide range of intra-league arrangements inherent in the production of a professional league's joint product. If limitations on inter-team "competition" entitle league members to act unilaterally, may a league member do so *whenever* its action will maximize its revenues vis-a-vis other league members? May a team with box office appeal challenge under

Section 1 league-wide revenue sharing arrangements and insist upon a preferential sharing of ticket revenues to maximize its "competitive" position? May dissenting members schedule games against each other rather than play a league's new "expansion" teams in order to maximize their revenues as "competitors"? These are the profit maximization theories that underlie the Raiders' claim to "competitor" status here. Are all such matters to be resolved by juries under the "supple, flexible"—and entirely unpredictable—rule of reason? Raiders Br. 10.[5]

Certain agreements among League members, such as the location agreement, do not by any reasoning bring together economic forces that had previously acted independently in the marketplace. From its inception, the NFL has been an admittedly lawful joint enterprise. As an NFL member, the Raiders have never sought to set up a competing league or hire out as a barnstormer. They simply want to retain all the benefits of the NFL joint enterprise, but on terms dictated by them rather than by joint decision of the participating members. By virtue of the ruling below, the Raiders have forced the entire NFL membership to accept an individual club's unilateral determination as to where League operations will be conducted. But the common enterprise remains in operation because of, and only because of, numerous internal agreements that limit the individual clubs' freedom of action in the same manner as the location agreement.

While respondents concede that league members must be able to agree upon certain matters, such as the scheduling of games (Coliseum Br. 5) and "arranging the games and administering the playing against each other . . ." (Raiders Br. 9), they offer no principled basis for distinguishing such permissible agreements from the NFL location agreement. In traditional parlance, scheduling agreements involve refusals to deal with

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[5] While the rule of reason has an important place in the administration of Section 1, it cannot serve to bring within the section non-collusive actions not within the contemplation of Congress in enacting the Sherman Act. This Court so held in *Copperweld*, rejecting a contention accepted by the minority that *any* action involving two or more legally separate parties should be tested under the rule of reason. 104 S. Ct. at 2746.

certain league members, allocations of territories within which games will be played, and limitations on each "competitor's" output. *See* Pet. at 13-14, n.25. If such arrangements are inherent in league operations and permissible, as respondents concede, they must be so because a league is a common enterprise rather than a collection of independent competitors in implementing such agreements.

In treating the NFL location agreement as a continuing conspiracy subject to Section 1 review, the decision below fails to articulate a coherent antitrust principle that takes into account the inherent "jointness" of league operations. See R. Bork, *The Antitrust Paradox*, 332 (1978). The decision thus does not promote any business competition between "true competitors" (15a) but only precludes the "coordination [that] may be necessary if [this] business enterprise is to compete effectively." *Copperweld, supra*, 104 S Ct. at 2731.

II. PETITIONERS DO NOT SEEK IMMUNITY FROM SECTION 1 OF THE SHERMAN ACT

Petitioners seek only a principled determination of whether "every [league] action [is subject] to judicial scrutiny for reasonableness" (*id.* at 2744), or whether "the logic underlying Congress' decision to exempt unilateral conduct from § 1 scrutiny . . . excludes the conduct" of leagues in jointly deciding where league operations will be conducted. *Id.* at 2745.[6]

The need for such clarification and the potential of the decisions below for magnified antitrust confusion (Pet. 6-14) are emphasized in respondents' own submissions. The Raiders recognize that the "NFL has a legitimate interest in where any

[6] Until the courts below held that league location commitments were subject to Section 1 as conspiracies, the accepted understanding was that such commitments constituted the lawful conduct of a single enterprise. *See* San Francisco Seals v. National Hockey League, 379 F. Supp. 966, 969-70 (C.D. Cal. 1974); and J. Weistart & C. Lowell, *The Law of Sports*, § 5.11, at 698-70 (1979). The Department of Justice itself, through the Antitrust Division, had expressed the view that league decisions on the location of teams may not even present "an antitrust issue" and, in any event, "are not terribly amenable to antitrust resolution . . . . " House Select Committee on Professional Sports, "*Inquiry into Professional Sports*," 94th Cong., 2d Sess. 296, 301 (1976).

member club may play its home games;" they quarrel only with the particular NFL arrangements to which they themselves had subscribed. Br. 12-13. In contrast, the Coliseum asserts that sports leagues could operate "perfectly well" if every team selects its own location for each season, and it suggests that to survive a Section 1 challenge a sports league must prove that it "could not produce games" in the absence of the arrangement challenged. Br. 8.[7]

Respondents assert that if the NFL is recognized as a single enterprise in determining team locations, then Section 1 "could never apply unless NFL concerted with nonmembers." Raiders Br. 17. This simply is not so. Both the dissenting judge below and others have recognized the distinctions between intra-league agreements on scheduling, team location, and other matters confined to the production of NFL football and agreements that restrict the extra-league activities of the clubs collectively or individually. *See* Pet. 12-13, 18-19. One important distinction is whether a league agreement relates to a co-production activity that directly determines the joint conduct of *all* league members or whether it determines the conduct only of an individual club. League members can and do contract with players and coaches individually; they can and do sell their game tickets individually; and club owners may and do have interests outside of NFL football. Agreements as to such matters—whether among league members or with nonmembers—thus constitute concerted action and would be subject to rule of reason review.

But the determination of the locations at which league members present the league product is fundamentally different.

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[7] As noted in the brief Amicus Curiae of the National Basketball Association, this sweeping reading of the decision below has already been advanced by counsel for the respondent Coliseum, in litigation with that basketball league, where an NBA member seeking unilaterally to relocate to the coliseum's basketball arena asserts that under the Ninth Circuit's decision "*any* restriction of *any* kind on the alleged right of a team unilaterally to select the location of its games is a violation of Section 1 . . . . " *Id.* at 4-5, n.3; emphasis original. *See also* the Brief of Public Entities as Amici Curiae in Support of Granting Writ of Certiorari, at 2; and Brief for the Mayor and City Council of Baltimore as Amicus Curiae Supporting Petitioners, at 4-8.

Such determinations are "essentially internal marketing decisions" of the league venture (J. Weistart & C. Lowell, *supra,* at 701)—"not unlike the choice a chain store company makes when it selects a particular corner lot as the location of a new store." *American Football League* v. *National Football League,* 323 F.2d 124, 130 (4th Cir. 1963). Each such determination directly involves the interests of, and controls the conduct of, all league members. *See* Pet. 13-14. All clubs are, for example, required to present NFL games both at "home" and at league-designated "away" locations during each season. Indeed, many NFL clubs derive a large majority of their revenues from operations other than those at their "home" locations.

This Court should not, as the Raiders urge, decline to act pending future legislation by Congress. Raiders Br. 24-27. The issue, as we have shown, is not immunity from Section 1 of the Sherman Act, but a reasoned determination whether that Section's prohibition against collusion among independent competitors applies to joint action by the owners of a common enterprise. Such a determination is analogous to that made last Term in *Copperweld.*

The Sherman Act is notoriously open-ended. This Court early concluded that it would be necessary for predictability in antitrust law to articulate Sherman Act rules and distinctions that in other contexts are often contained in statutes themselves. *See* F. Easterbrook, *Vertical Arrangements and the Rule of Reason,* 53 ABA Antitrust L.J. 135, 137 (1984). Only recently, the Court observed that "Congress did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations." Instead, "it expected the courts to give shape to the statute's broad mandate by drawing on the common law tradition." *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 688 (1978).

In this case, as in *Copperweld,* the Court is asked to apply the broad mandate of Section 1 to an important concrete situation. It is altogether appropriate and consistent with its practice over nine decades of Sherman Act jurisprudence that the Court should do so rather than defer to the vagary of future congressional action.

CONCLUSION

The majority below, notwithstanding its decision in favor of respondents, observed:

> "The NFL is an unique business organization to which it is difficult to apply antitrust rules which were developed in the context of arrangements between actual competitors." (33a.)

Its attempt to surmount this difficulty puts at high risk the ability of all sports leagues to manage their internal affairs without continuing, expensive antitrust harassment. It also offers a treble damage inducement to league members to breach comprehensive agreements governing the joint business operations of lawful enterprises, a result in direct conflict with the objectives of the antitrust laws.

A writ should issue.

Respectfully submitted,

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JOINT OPPOSITION TO NATIONAL BASKETBALL ASSOCIATION'S MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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Nos. 84-406, 84-418

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

NATIONAL FOOTBALL LEAGUE, et al.,
Petitioners,

vs.

OAKLAND RAIDERS, LTD. and LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents

JOINT OPPOSITION TO NATIONAL BASKETBALL ASSOCIATION'S MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

I. Permission for NBA to File an Amicus Brief Should Be Denied.

Respondents object to the motion of National Basketball Association ("NBA") for leave to file an *amicus* brief, and for two reasons.

First: NBA has not been diligent. On October 4, 1984 NBA's counsel requested consent to file from counsel for respondent Los Angeles Memorial Coliseum Commission and was refused. On October 4th, NBA counsel telephoned counsel for respondent Los Angeles Raiders, who was not then in his office, and did not pursue the request until October 8th. Consent was then refused. NBA should have filed its motion promptly. Raiders' counsel did not receive

a copy of the motion until October 18th, the very day on which respondents' joint brief in reply to the other *amici* briefs was transmitted for filing. Had the motion been presented sooner, a reply to it could have been included in respondents' joint reply to the other *amici* briefs.

Second: NBA's proposed brief does not assail the correctness of the decision of the Court of Appeals in this case, beyond a token statement that "we submit that the Court of Appeals erred" (p. 4). Instead, its discussion proceeds on two irrelevancies, both on the assumption that the decision below is correct. The first is that this Court should use the present case as a vehicle to provide a general disquisition or treatise on what might be called "the law of club relocation in professional sports" (p. 4). NBA laments that every relocation of a sports club produces a flurry of litigation with suits seeking to condemn sports clubs under eminent domain law, suits brought to enjoin suits under eminent domain law, suits for injunctions under common law or other state law suits under state antitrust laws, and the like. There is no way to prevent litigation in a litigious society. It is not a function of *certiorari* jurisdiction to utilize a particular case to resolve all the problems of society.

NBA's second reason for seeking *certiorari* is that, while it sought to amend *its* own relocation rule after the decision below, nevertheless *its* proposed rule is being assailed in current litigation. This is a request that the Court use the present *certiorari* petitions as a vehicle to issue an *advisory* opinion to govern the outcome of NBA's litigation concerning its own relocation rule, in which it had so little confidence that it allowed the Clippers to move without compliance.[1]

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[1]By contrast the NFL refused to permit the Raiders to move and successfully opposed a preliminary injunction by arguing that damages would be an adequate remedy.

For these reasons we submit that leave to file the brief should be denied. If, however, leave should be granted, we proceed below to answer the brief.

II. The NBA Has Not Devised Any Arguments Which Would Justify This Court's Grant of Certiorari.

NBA's motion for leave to file an *amicus curiae* brief seeks to induce this Court to grant *certiorari* on the false premise that the federal courts are unable to cope with the application of the antitrust laws to sports leagues. Accordingly, NBA concludes that sports leagues must be exempt from those laws.

The facts simply cannot be manipulated to support this incorrect image. As discussed in respondents' briefs, the circuits have been uniform and consistent in applying the Sherman Act to joint conduct by sports clubs. The lower courts have unanimously rejected the claim that sports clubs constitute a "single enterprise" not subject to Section 1 of the Sherman Act. Those circuits have also agreed that such conduct should be evaluated by the traditional Rule of Reason analysis prescribed by this Court in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). See *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381 (9th Cir. 1984); *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir. 1982) *cert. denied*, 459 U.S. 1074 (1982); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

Where the conduct at issue has been shown to have an anticompetitive purpose and effect, it was found to violate the Sherman Act. *E.g., NASL v. NFL, supra.* Where the conduct was shown to be for a legitimate purpose and to have no anticompetitive impact, it was upheld. *E.g., Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979)

(hockey league's safety rules upheld); *Molinas v. National Basketball Association*, 190 F.Supp. 241 (S.D. N.Y. 1961) (upholding league's rules on gambling).

Thus, the antitrust laws have been applied to the sports industry in precisely the same manner as any other industry, with no greater uncertainty or confusion. The only distinction is that the courts have applied the Rule of Reason to evaluate conduct by sports leagues which in any other industry would be condemned out of hand under a *per se* analysis. For example, the division of territories into exclusive markets which was the subject of this lawsuit is automatically condemned under the Sherman Act in any other industry.[2] *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). The Rule of Reason case-by-case approach surely involves less certainty than the extremes of the spectrum — *per se* condemnation or immunity. But it is the best mechanism for assuring that anticompetitive schemes are rejected while neutral or pro-competitive arrangements are permitted.

Contrary to NBA's brief, most sports league relocations are accomplished without litigation. Moreover, the brief flurry of lawsuits relating to moves by the Raiders and Colts were largely state court claims for breach of contract or eminent domain. Such actions would be unaffected by a grant of *certiorari* here. The same is true for the suits filed in the 1970's over the relocations of the Braves and the Jazz.[3]

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[2]The NFL's division of territories not only prevented head-to-head competition between the Rams and the Raiders but prevented the Raiders from competing with *all* NFL clubs for the revenue needed to acquire the best players, coaches and facilities.

[3]*City of Buffalo v. Atlanta Hawks*, No. 76 Civ. 261 (W.D.N.Y. 1976); *City of Buffalo v. Buffalo Braves, Inc.*, No. 30407 (Sup. Ct. Erie Co. 1976)

As to the "firestorm of legal activity" relating to the Clippers' relocation to Los Angeles, NBA neglects to mention that the *only* lawsuit filed in connection with the Clippers recent move was filed by the NBA itself. The recent circuit court decisions in this area have apparently settled the law in the eyes of everyone except NBA, which simply refuses to accept the outcome.

CONCLUSION

It is not the courts which are confused by the application of traditional antitrust principles to sports leagues. Nor are the leagues themselves genuinely confused; they simply are adamant in their refusal to accept that they are subject to the antitrust laws.

Large portions of the NBA's brief are lifted verbatim from testimony which an NBA spokesman recently gave in Congress. The NBA's plea for special treatment and immunity from the Sherman Act, like the NFL's, is properly addressed to Congress.

Respectfully submitted,

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